CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

AT MORGANTON,

AUGUST TERM, 1850.

LEWIS CAMP & AL. vs. A. R. HOMESLEY.

Where a recovery is had in ejectment, upon the several demises of different persons, all the lessors may unite in a joint action for the mesne profits.

Tenants in common may, in general, sue separately for trespasses on real estate, yet they may also join in such action, in respect to the injury being to their joint possession.

The case of *Holdfast* v. *Shepard*, 9 Ire. 222, cited and approved.

Appeal from the Superior Court of Law of Cleaveland County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

The action is brought by Camp and four others, and is trespass for the mesne profits of a tract of land, recovered in ejectment upon the several demises of the present plain-

tiffs. Upon the trial on the general issue, it appeared, that the plaintffs and the defendant were tenants in common of the premises. The counsel for the defendant thereon insisted, that the plaintiffs could not recover, because a tenant in common cannot have trespass against his companion; and, if that be not so, because the several lessors of the plaintiff in the ejectment cannot join in this action. The Court gave instructions to the contrary, and the plaintiff had a verdict and judgment and the defendant appealed.

G. W. Baxter, for the plaintiffs.
Thompson, for the defendant.

Ruffin, C. J. The directions were right on both points. As the action for mesne profits is substantially a continuation of the ejectment, for the purpose of recovering the actual damages, which were formerly nominally assessed, it follows, that whenever a person is allowed to maintain ejectment, he may have trespass against the same party, by way of completing his remedy. Hence, it is settled, that, after a recovery in ejectment and entry, a tenant in common may sue his companion, who ousted him, for the mesne profits. *Catting* v. *Darby*, 2 Wm. Bl. 1077, *Goodtitle* v. *Tombs*, 3 Wil. 118, *Holdfast* v. *Skepard*, 9 Ire. 222. Then, as to the other point, although it be true, that tenants in common may, in general, sue separately for trespasses on real estate, yet it is established, that they may also join in such action, in respect to the injury being to their joint possession. *Chamier* v. *Clingo*, 5 M. & S., and *Chamier* v. *Slingow*, 2 Chitt. Rep. 410, are direct decisions to that point; and there seems to be no reason, why the case of two or more tenants in common, thus suing their fellow, after recovering in ejectment, should not fall under the common rule.

Per Curiam. Judgment affirmed.

ALEXANDER FOX *vs.* JOHN B. WOOD.

A *ca. sa.*, issued by a justice of the peace in Buncombe County, ought to be returned to the County Court of that County, notwithstanding the provisions of the Act of 1844, abolishing jury trials in the County Courts of Buncombe.

The case of the *State* v. *Sluder*, 8 Ire. 487, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Fall Term 1848, his Honor Judge MANLY presiding.

The only question presented is, whether a *ca. sa.*, issued by a justice of the peace in the County of Buncombe, ought to be returned to the County or Superior Court, under the provisions of the Act of 1844, which abolishes jury trials in the County Courts of Buncombe and some other counties.

The *ca. sa.* was in the usual form, and, after directing the officer to have the body before some justice of the peace of the said County, to satisfy, &c., concludes thus: "and, in case he shall give bond and security according to law, for his appearance before your County Court, you are to take the same and make return thereof, with all the proceedings in the case, to said Court, and herein fail not."

The officer took a bond for the appearance of the defendant at the next term of the Superior Court, to which Court he returned the writ, and the Judge below refused a motion to dismiss, entertained jurisdiction of the case, and the defendant was allowed to appeal.

J. Baxter and *N. W. Woodfin*, for the plaintiff.
Henry and *Gaither*, for the defendant.

RUFFIN, C. J. His Honor was of opinion, that the Act of 1844 transferred jurisdiction in such a case directly from the justice of the peace to the Superior Court.

We do not concur, but believe the proper construction of the Act of 1844 only takes to the Superior Court, in the first instance, such cases as will require the intervention of a jury as a matter of course. A statute, making an exception to the general law, should be confined to the object which was in view, and the necessity which gave rise to it. The statute under consideration provides, among other things, that *all* appeals from a justice of the peace in the Counties of Buncombe, &c., in civil cases, shall be returned to the next term of the Superior Court. This is not an appeal, and does not come within the words, nor does it come within the necessity, of the Statute; for it may be, that an issue of fraud will not be made up. In appeals, the issue is made and tried by the magistrate, and a jury will be required in the Court, to which it is carried, as a matter of course, unless one party or the other makes default.

Proceedings in bastardy are returnable to the County Court, and if an issue is made up, it is taken to the Superior Court by *certiorari*. *State* v. *Sluder*, 8 Ire. 487.

The same principle governs this case. The judgment below ought to be reversed and the motion to dismiss allowed.

This opinion will be certified to the Court below.

PER CURIAM. Ordered accordingly.

MICHAEL FRANCIS vs. WILLIAM WELCH.

A negro slave was permitted by his master to own a horse. Afterwards the negro was sold to A., and the horse was taken to the latter's house. A. directed the negro to take the horse away, and he was accordingly given to the negro's son, who was the slave of B. B. set up no claim to the horse and his slave sold him to another person. *Held*, that A. could support no action against B. for the value of the horse.

An executor *de son tort* is entitled to no action.

One cannot be held liable as executor *de son tort*, where there is a rightful executor, except in cases alleged to be fraudulent.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term 1850, his Honor, Judge CALDWELL presiding.

This is trover for a horse, tried on not guilty pleaded. The evidence was, that one Love owned a slave, and permitted him to purchase a horse and use him as his own. After the death of Love, his executors delivered the slave to one Prather, to whom he had been bequeathed by Love, and Prather sold and delivered him to the present plaintiff. When the slave went to the plaintiff's, he took the horse with him; but, after some time, the plaintiff objected to having the horse kept there, and the slave then put him into the possession of his son, who belonged to the defendant, and kept the horse on the defendant's plantation as his own—the defendant not assuming any control over the horse. Afterwards—how long did not appear—the plaintiff borrowed the horse from the defendant's negro to drive to an adjoining County, and, on his return, he locked him up in his stable for the night. The next morning the horse was gone, and afterwards he was seen in the possession and use of the defendant's slave on his plantation for a few days, and until, in the absence of

the defendant from home and without his knowledge, as far as appeared, the said slave sold the horse. The plaintiff, in some short time afterwards, demanded the horse from the defendant, and then brought this suit.

The plaintiff, thereupon, insisted that he was entitled to a special property in the horse, as the bailee of Love's executors, the owners; and, further, that, if not so entitled, he had a right to the horse as the executor *de son tort* of Love, responsible over to the lawful executors.—But the Court refused so to instruct the jury, and the plaintiff submitted to a non-suit and appealed.

N. W. Woodfin and *J. Baxter*, for the plaintiff.
Gaither, for the defendant.

Ruffin, C. J. There is no ground whatever for the action. If the property were in the plaintiff, there is no evidence of a conversion by the defendant, who, when the plaintiff would not let the horse stay at his house, merely allowed his negro to keep him and set up no claim to him. Property, got by a slave, may, for his want of capacity, vest in the master; but, certainly, a slave cannot, by conversion, divest the property from the owner and vest it in his master, so as to render the latter liable for such conversion. But the plaintiff had, in truth, neither a general nor a special property in the house. According to his own position the property was in Love's executors, and from them it never passed, as far as is seen; at all events, not to the plaintiff, who purchased the negro only and not the horse. As to his being executor of his own wrong, the answer is, that the law holds such an executor to many liabilities, but gives him no action; and, moreover, that one cannot be held liable as executor *de son tort*, where there is a rightful executor, except in cases alleged to be fraudulent.

Per Curiam. Judgment affirmed.

E. G. MORROW *vs.* J. B. ALLISON.

Where a *scieri facias* has been sued out upon a judgment, and, while it is in the sheriff's hands, the parties agreed that the collection of the money should be suspended, so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement, if he fails to do so.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term 1850, His Honor Judge CALDWELL, presiding.

This is a *scieri facias* on an amercement *nisi* of $100, for not making return of a writ of *scieri facias*, sued out upon a judgment recovered by the plaintiff against one Smith and one Rhinehardt, and delivered to the defendant, then the sheriff of Haywood. The defendant pleaded *nul tiel record* of the order *nisi*; which was adjudged against him. He also pleaded specially, that the plaintiff directed the defendant not to return the said writ.—On the trial, evidence was given on the part of the defendant, that, while the sheriff had the writ in his hands and before the day for the return thereof, an agreement was entered into, between the plaintiff and the defendant in the execution, to suspend the collection of the money mentioned in the writ, with a view to a settlement between them in relation to it and other dealings between them. The Court directed the jury, that, if the parties made such agreement to suspend the collection before the return day of the execution, the defendant was not liable to be amerced, at the instance of the plaintiff, for not returning the execution. The jury found for the defendant and he had judgment, and the plaintiff appealed.

J. Baxter, for the plaintiff.

N. W. Woodfin, Henry and G. W. Baxter, for the defendant.

Ruffin, C. J. If this were a rule for an attachment, on which the Court could hear affidavits to purge the contempt, probably a case might be made for discharging the officer. But it is not a proceeding of that sort; and, on the contrary, it is for a penalty, expressly given by statute, to the party grieved, against a sheriff, who neglects to make due return of process, delivered to him twenty days before the Court, to which it is returnable. The plaintiff in the execution is, therefore, legally entitled to an amercement against the officer, who fails in that duty, unless he be discharged by the party from its performance. Though pleaded, there is here no discharge in point of fact. An agreement to suspend the collection of the debt, or to stay the execution, as it is commonly called, even if communicated to the sheriff, gives no authority to the officer not to return the writ. The return may be material to the creditor in several ways; as to enable him the earlier or the more readily to sue out another writ, or to rebut the presumption of satisfaction, or the like.—Certainly, a direction not to enforce the immediate payment of the debt in the execution is not a direction, nor even an allowance, that the sheriff should not return the writ. The jury, therefore, was not sustained by the evidence and ought not to have found for the defendant, and the judgment must be reversed and a *venire de novo* awarded.

Per Curiam Judgment accordingly.

WILLIAM PARHAM *vs.* JOSEPH HARDIN.

Where a suit is commenced in the Superior Court for a less sum than sixty dollars for goods, &c. sold, or for a less sum than one hundred due by note, &c., the suit shall be dismissed; and if the party demands more in his writ for the purpose of evading the law, and the jury finds that a less sum is due to him than that of which the Court has jurisdiction, he shall be non-suited: provided that if the party will make affidavit that the sum, for which he has sued is really due, but he cannot establish it for want of proof, or that the time limited for the recovery of any article bars a recovery, then the plaintiff shall have judgment, &c.

Held, that the same rules apply to suits in the Superior Court of Cleaveland County, removed, under the private acts of 1844 and 1846, from the County to the Superior Court of that County.

The case of *Clark v. Cameron*, 4 Ired. 161, cited and approved.

Appeal from the Superior Court of Law of Cleaveland County, at the Spring Term 1850, his Honor Judge CALDWELL, presiding.

J. G. Bynum, for the plaintiff.

J. Baxter and G. W. Baxter, for the defendant.

NASH, J. The action was commenced in the Superior Court of Cleaveland County. The declaration was in *indebitatus assumpsit* for one hundred dollars. On the trial, the plaintiff proved an account for sixty-one dollars, which was reduced by a payment to forty-one dollars, for which sum the jury rendered a verdict. The Court, on motion of the defendant, set aside the verdict and non-suited the plaintiff, because the Court had not jurisdiction.

By the 40th sec. of the act of 1836, it is enacted, "that no suit shall be originally commenced in any Court of record for any debt or demand of less value than sixty dollars, for goods, wares and merchandise," &c., "nor for any sum of less value than one hundred dollars due by

bond, note," &c. By the 41st sec. it is provided, "if any suit shall be commenced in any of the said County Courts for any sum of less value than sixty dollars, contrary to the provision of the preceding section, the same shall be abated on the plea of the defendant," &c. The 42nd sec. directs, that "if any suit shall be commenced in any of the Superior Courts, contrary to the provisions of the 40th sec. the same shall be dismissed by the Court, and if any suit shall be commenced in any of the Superior Courts contrary to the true intent and meaning thereof, or if any person shall demand a greater sum than is due, on purpose to evade the operation of this act or otherwise, and by the verdict of a jury, it shall be ascertained, that a less sum is due to him in principal and interest, than by the provision of the said 40th sec. the said Court has jurisdiction of, then and in that case, it shall be the duty of the Court to non-suit the plaintiff; and he shall pay all costs: provided, that if the plaintiff will make an affidavit to be filed in the case, that the sum, for which the suit is brought, is really due, but, that for the want of proof or that the time limited for the recovery of any article bars a recovery, then the plaintiff shall have judgment," &c.

The result from these different sections is, that if a suit be *commenced* in the County Court, for a sum of less value than sixty dollars, it shall be abated upon the defendant's plea. He cannot, if he plead in chief, avail himself of the prohibition by a motion to dismiss. If the suit be in the Superior Court, and be commenced for, that is, "if the writ demand, a less sum than that pointed out in the 40th sec. the Court shall dismiss it." *Clark* v. *Cameron*, 4th Ire. 161. The object of the Legislature, however, might be evaded in the latter case, by demanding in the writ a sum which would give the Court jurisdiction, when, really, a less sum was due. In such case, the Court cannot dismiss the suit. It cannot judicially

know the fact to be that it had not jurisdiction; but that difficulty is met in the 42nd sec. If the suit shall be commenced contrary to the provisions of the 40th sec. or if a greater sum is demanded in the writ than is due, with the intent to evade it, and the verdict of the jury shall be for a sum less than that which gives jurisdiction to the Court, the plaintiff shall be non suited and pay the costs; and the Legislature considers the finding of a less sum by the jury as proof of the *intent* of the plaintiff, in demanding a larger sum than is found due. And such has been the practice under the act as far as we are informed. But it is not conclusive upon the party—for he may, under the first proviso, show, that the sum really due is such as to give jurisdiction to the Court. The plaintiff, however, contends, that, as he could have brought his action in the County Court by the general law, and as jury trials in that tribunal are abolished in Cleaveland County and transferred to the Superior Court, by a just construction of the local acts, advantage must be taken of the want of jurisdiction, as is pointed out in the 41st sec. and that the provisions of the 42nd sec. do not apply to such a case. We do not concur in this view of the law. By the local act of 1846, ch. 150, the trial by jury is abolished in the County Court of Cleaveland, and it is declared, that an act passed in 1844, giving to the Superior Courts of the Counties of Yancy and others original and exclusive jurisdiction in all cases, where the intervention of a jury may be necessary, shall extend to the County of Cleaveland. By the 5th sec. of the act of 1844, *all* suits are directed to be brought in the Superior Courts of the Counties embraced in the act. By the local act of 1846, the 41st sec. of the general law, so far as the County of Cleaveland is concerned, is repealed. The jurisdiction of the County and Superior Courts is not concurrent in all suits upon money demands. The private act of 1846 did not increase the jurisdiction which the Superior Court of

Cleaveland would have had under the general law; its only effect, in this particular, was to increase its business, by throwing into it original suits, which might have been brought in the County Court; nor does it disturb the provisions of the 42nd sec. of the general law. As to the proceedings of the Superior Courts, they remain as they were under the act of 1836. By this latter act, the finding of the jury ascertains the sum actually due to the plaintiff, and also the intent with which a larger sum was demanded in the writ, "to-wit," to evade the act; and but for the proviso, it would have been conclusive upon the plaintiff, and the Court would have been imperatively bound to non-suit him, *non obstante veredicto*.—But the proviso put it in his power to avoid the conclusion, if the facts will justify him in making the required affidavit. This has not been done—and the Court committed no error in the judgment pronounced.

PER CURIAM. Judgment affirmed.

JOSEPH BROWN vs. JAMES RAY, SEN.

Where A. contracted to deliver to B. a certain quantity of corn, if called for by a particular day, and B. did not call for it till some time afterwards, *Held*, that B. was not entitled to recover in *assumpsit* on the contract.

Appeal from the Superior Court of Law of Yancy County, at a Special Term in July 1850, his Honor Judge BATTLE presiding.

N. W. Woodfin, for the plaintiff.
J. W. Woodfin, for the defendant.

Nash, J. The plaintiff declared in assumpsit, for the non-delivery of a quantity of corn. The case was—the defendant being much indebted, several of his creditors obtained judgment against him, the executions upon which were levied on the corn in question, which was sold in parcels, and the plaintiff became a purchaser of three of the lots. After the sale had closed, the officer observed to the parties, that he could not, at that time, measure out to the purchasers their respective quantities, and proposed to the defendant, that he should do it. He agreed to do so. One witness stated his agreement to be, that he would deliver it, whenever they would call for it. Another witness stated the agreement to be, that he would deliver the corn, if the purchasers would call for it in a week or ten days. The sale and the agreement were made on the 26th March 1846, and the demand for it in June or July following. His Honor instructed the jury, if the promise by the defendant to deliver the corn was, as stated by the first witness, the plaintiff was entitled to recover; but if it was, as stated by the second witness, he was not, because in that case, the defendant's promise to deliver did not extend beyond the time specified, and the subsequent refusal in June or July, did not vary the case. The jury found for the defendant and from the judgment the plaintiff appealed.

We entirely concur with his Honor in the opinion given by him, and for the reason expressed. There being contradictory evidence as to the terms of the contract, it was a proper subject of enquiry to be made by the jury, what was the true and correct agreement? They found that the defendant had agreed to deliver the corn, if called for in a week or ten days. This being the contract, the plaintiff, to avail himself of it, in this form of action, ought

to have demanded the corn within the time specified—that is on or before the first of April '46—as the days would then have expired. The action is on the contract and not for the conversion. The demand and refusal to deliver being made in June, might have entitled the plaintiff to damages in another form of action, but not in this.

PER CURIAM. Judgment affirmed.

HENRY E. LYNCH vs. WILLIAM T. JOHNSON.

The jury cannot allow commissions to an executor, &c., without a previous order of the County Court; but it is not necessary that this order should be made before the commencement of the suit against the executor.

The Act of 1826, Rev. Stat. ch. 31, sec. 119, authorizing references to be made in Courts of law to state the accounts of administrators, executors and guardians, applies only to suits brought upon their bonds respectively. It does not apply to suits, brought upon bonds given by a testator or intestate, in which fully administered is pleaded.

Appeal from the Superior Court of Law of Henderson County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

This is an action of debt on a bond given by the intestate. Plea, *plene administravit*. By an agreement between the parties, it was referred to the Clerk to inquire into the assets and state an account thereof, shewing the balance. The report gave the defendant credit for $181, as commissions allowed him by the County Court pending the enquiry; and the plaintiff excepted thereto on the

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ground that the Court had no power, after this suit brought, to make the order so as to affect these parties. The report also gave the defendant credit for several sums paid, before this suit brought, to persons, who had paid bonds given by the intestate and themselves as his sureties; and the plaintiff excepted also to them upon the ground, that they were simple contract debts. The plaintiff brought on his exceptions to be argued and the Court overruled them; but the plaintiff was allowed to appeal.

No counsel for the plaintiff.

J. Baxter and *N. W. Woodfin*, for the defendant.

RUFFIN, C. J. The points made by the exceptions are very plain and were correctly decided. A jury cannot allow commissions, without a previous order of the Court, before which the administrator was to account. *Hodge* v. *Armstrong*, 3 Dev. 253. If the exception were well founded, the consequence would be, that a creditor could always defeat the party of his commission by bringing his suit soon after administration granted, and before the estate was in a condition to admit of a return of an account and a motion for commissions. In such cases, the allowance is necessarily made, pending the action.

The Act of 1829 changed the rule of the common law on the second point, as it gives to the claim of the surety, paying a debt of the principal, the same priority against the assets, which belonged to the creditor.

If the case, then, depended on those points alone, the judgment would be affirmed. But it cannot be done, as the Court is of opinion it was erroneous to take cognizance of the report and exceptions. The parties seem to have proceeded on the notion, that the Act of 1826, Rev. St. ch. 31, sec. 119, embraced cases like this. But that is a mistake, as that act has only suits brought on the bonds of executors, administrators and guardians in its purview,

and it leaves the trial of the issue upon *plene administravit* to the jury and upon the evidence required at the common law. It is not uncommon, it is said, for parties to make references of this kind. If so, it is a matter of consent, for convenience sake, so as to reduce the points to be disputed, to as few as possible, and thus save the delay and expense incident to proving the whole administration account on the trial.

As to the matters disputed, however, the Court cannot act judicially on exceptions to the report, as in equity, or in the cases within the act of 1826, but only by giving instructions on them, as in other cases, when asked upon the trial before the jury. Therefore, although the opinions given in the Superior Court were, in themselves, right, it was wrong to give them at all; and for that reason, it must be certified to that Court, that the decision ought to be reversed. But as the error, for which the reversal is directed, was caused by the plaintiff, who is the appellant to this Court, he cannot have his costs, but must pay those of the defendant, as was done in the similar case of *Hicks* v. *Gilliam*, 4 Dev. 217.

Per Curiam. Ordered accordingly.

JONATHAN FORD *vs.* LEWIS VANDYKE.

In charging a guardian, the mode of compounding interest is to make annual rests, making the aggregate of the principal and interest, due at the end of a particular year, a capital sum bearing six per cent. interest thence forward for another year, and so on, with rests from year to year. But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made.

Where an assignee of a bond brings an action of debt upon the bond, and the defendant pleads *non est factum* only, this plea does not deny the assignment. But, if the action be on the case, as given by our Statute to the assignee of a bond, the general issue denies both the execution of the bond and the endorsement.

Appeal from the Superior Court of Law of Macon County, at the Fall Term 1849, his Honor Judge Ellis presiding.

The declaration is in debt on a bond for $170 12, alleged to be executed by the defendant to George R. Ledford, indorsed to Javan Trammell and by him to the plaintiff. Pleas, *non est factum*, payment, and the statute against usury. The bond produced on the trial was for $262 56, with sundry payments credited on it. After proving its execution, the plaintiff offered it in evidence, and the defendants objected to it for the variance between it and that declared on; but the Court received it. On it were the two endorsements stated in the declaration, but that to the plaintiff purported to be made in the name of Javan Trammell "by his agent, Newell Trammell." The plaintiff then produced a witness, who stated, that

he was with said Javan and Newell at their residence in Georgia, before the endorsement to the plaintiff, and the former said, that he was too unwell to visit North Carolina, and he intended to send Newell to do some business for him, and that, on the same occasion, Newell stated to the witness, that he was going to North Carolina to collect a bond on Lewis Vandyke; but the witness could not tell, whether Javan heard that or not. Upon that evidence and after objection from the defendants, the endorsements were read to the jury The defendants then gave evidence, that the defendant Vandyke had been the guardian of the obligee, Ledford, and that about three months after Ledford came of full age, he and Vandyke met for the purpose of making a settlement, and that, between themselves, they ascertained the principal sums received, the disbursements made by the guardian for the ward, and that, then, they referred it to three persons to make the proper calculations of interest, so as to compute the sum then due to Ledford, and that, in doing so, those persons calculated compound interest up to the day of the settlement, and thereby made the balance of principal and interest amount to the sum of $262 56 for which the bond was given.

The counsel for the defendant insisted, that the bond was usurious, and also, that Newell Trammell had no power to make the endorsement to the plaintiff. But the Court instructed the jury, that the transaction between Ledford and Vandyke was not usurious; and that, if they believed Newell Trammell had in fact been authorised by said Javan to endorse the bond in his name, they ought to find for the plaintiff, after deducting the payments proved. The jury found the payments, and then a balance of principal money of $172 69, due on the bond, and assessed damages for interest since the last payment, and also found for the plaintiff on the plea of usury, and after judgment the defendant appealed.

J. W. Woodfiin, for the plaintiff.
J. Baxter, for the defendant.

Ruffin, C. J. The instructions were right upon the question of usury The point, as to the amount of interest, was referred to arbitrators, and there is nothing to shew, that their determination was not the honest result of their judgment, without collusion with the view of giving color to an arrangement of the parties in evasion of the statute. The award, thus fairly made, judicially established the interest legally due, and one of the parties can no more unravel the award in order to open the question, than he could, for that purpose, go behind a judgment or decree of a Court of justice. Besides, the decision of the arbitrators was perfectly correct. It is true, that interest on a debt from a guardian, is not compounded after the ward comes of age But, that was not done here. The mode of compounding the interest in such cases, is to make annual rests, making the aggregate of principal and interest, due at the end of a particular year, a capital sum bearing six per cent. interest, thence forward for another year, and so on with rests from year to year.

But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made. That was this case; for the settlement was made within three months after the ward came of age, and, as the Court understands the statement, 6 per cent. interest merely was computed on the balance due at the preceding annual rest, during the infancy, from that day up to that of the settlement, on which the bond was given. That was legal, for as no rest was made after the full age of the ward, it is manifest he only got simple interest on the sum the law made principal during his minority. The other part of the instructions, if erroneous, was im-

material: since the endorsement from Trammell was not in issue on the record. If the plaintiff had brought the action on the case, given by the statute to the assignee of a bond, proof of the endorsement as well as of the bond would have been received on the general issue; because, that goes to every fact entering into the right of the plaintiff and the obligation of the defendant to him. But in debt on a bond, the plea *non est factum*, is, in terms, restricted to the point, that the supposed bond is not the defendant's deed; consequently, a special plea was necessary to put the endorsements in issue. But it was clearly erroneous to receive in evidence a bond for $262 56, under a declaration on one for $170 12, upon *non est factum* pleaded. The description of a deed in the declaration must be sustained by the proof; otherwise the pleadings do not identify the cause of action, and there would be no means, by which the defendant could avail himself, in another suit, of a judgment for or against him in this.

Per Curiam. Judgment reversed and *venire de novo*.

CHARLES COGLE *vs.* ALEXANDER HAMILTON.

A. being a surety for B., to indemnify him B. gave him a lien on some hogs. B. afterwards sold the hogs to C. A. refused to deliver the hogs, unless C. would agree to pay the debt for which A. was bound. This C. promised, but failed to make the payment, and A. had to pay the debt himself. He then warranted C. for the money so paid. *Held*, that a justice of the peace had no jurisdiction of the case.

Appeal from the Superior Court of Law of Henderson County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

N. W. Woodfin, for the plaintiff.
J. Baxter, for the defendant.

PEARSON, J. One Deaver held a note on one Richardson for fifty dollars, with the plaintiff as surety.—Richardson gave the plaintiff a lien on a parcel of hogs to indemnify him. Afterwards Richardson sold the hogs to the defendant: but the plaintiff refused to let him have possession, until he would undertake to pay the debt. Accordingly the defendant agreed to pay it, and the plaintiff thereupon agreed that he might take the hogs. The defendant took the hogs, but neglected to pay the debt to Deaver, except $19, which was paid by Richardson.—The plaintiff thereupon warranted the defendant, to recover the amount which he had paid Deaver. The defendant insisted, that a single justice of the peace had no jurisdiction. The judge in the Court below was of opinion, that the case was within the jurisdiction of a single justice of the peace, and so instructed the jury, who found

a verdict for the plaintiff, and from the judgment the defendant appealed.

We think the exception is well founded. The defendant had agreed, for a sufficient consideration, to pay the debt to Deaver. This was a collateral act, and the neglect to perform it gave the plaintiff a good cause of action. But it was not a "debt or demand," within the meaning of the Statute, conferring jurisdiction on a single justice of the peace. It was like a promise to go to Rome or to do any other act.

The plaintiff resorted to the common counts in assumpsit to sustain his case; but none of them will fit, supposing him to be at liberty to abandon the special contract. The count "for money paid" cannot be sustained, because there was no privity of contract between the defendant and Deaver. If there had been a contract between them, by which the defendant assumed to pay to him the debt of the plaintiff, it was void by the statute of frauds. So the money was not paid for the defendant's use.

The count, "for goods sold and delivered," does not apply, for the hogs were sold by Richardson, and the plaintiff merely gave up his lien, in consideration of the defendant's undertaking to pay the debt to Deaver. The price, over and above this undertaking, was due to Richardson; or, at most, it was a sale by Richardson and the plaintiff, in which case the action for the price must be by the plaintiff and Richardson jointly, for, although, under the special contract, each had a separate cause of action, under the implied contract, for the value of the hogs, the action would be joint.

The judgment must be reversed and a *venire de novo* awarded.

Per Curiam. Judgment accordingly.

BYNUM W. BELL *vs.* WILLIAM W. PEARCY.

The verdict of a petit jury, acquitting a man indicted for a conspiracy, does not, in an action for malicious prosecution, support the averment, that the indictment was without probable cause.

The case of *Griffis* v. *Sellars*, 4 Dev. & Bat. 176, cited and approved.

Appeal from the Superior Court of Law of McDowell County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

J. W. Woodfin and J. G. Bynum, for the plaintiff.
N. W. Woodfin and J. Baxter, for the defendant.

PEARSON, J. This was an action for a malicious prosecution. The plaintiff read in evidence a record, shewing that an indictment against him for a conspiracy had been found by the grand jury "a true bill," and that he had been tried and acquitted. The defendant admitted, that the proceeding had been instituted at his instance. There was no other evidence. The plaintiff moved the Court to charge, that his acquittal supported the averment of "a probable cause." The Court refused, and for this the plaintiff excepts.

Malice and a want of probable cause is the gist of the action. This averment is made by the plaintiff, and it is for him to prove it. He relies solely on the fact, that the jury have acquitted him. This has no tendency to shew a want of probable cause. The jury say, the evidence was not strong enough to convict. What was the force

of the evidence, how near it approached to conviction, whether the plaintiff was acquitted by having the benefit of a reasonable doubt, are matters, about which the verdict is of course silent. The grand jury find there was probable cause—the petit jury find that there was not sufficient to convict. *Non constat*, that there was no probable cause. The question is too plain to admit of argument.

In *Griffis* v. *Sellars*, 4 Dev. and Bat. 176, it is held, that if one be convicted in the County Court, and, upon appeal, is acquitted in the Superior Court, still the fact of his having been convicted is *conclusive* evidence of probable cause, and his subsequent acquittal does not open the question.

The finding of a grand jury has not this conclusive effect, and an acquittal opens the question, so as to give the party an opportunity to offer evidence to repel the presumption, growing out of the action of the grand jury. How the acquittal can have any further effect, we are at a loss to conceive.

PER CURIAM. Judgment affirmed.

THE STATE ON THE RELATION OF WAUGH & HARPER vs. ELISHA P. MILLER & AL.

Where money has been paid into a clerk's office upon a judgment, and the judgment is assigned, or the attorney's receipt for the note on which the judgment was obtained has been transferred, by the plaintiff in the judgment to a third person, such assignee has no right to sue the clerk for the money in his own name, as he had but an equitable interest.

The cases of *Jones* v. *Blackledge*, 2 Car. Law Rep. 457, and *Arrington* v. *Horn*, 2 Car. Law Rep. 631, cited and approved.

Appeal from the Superior Court of Law of Caldwell County, at the Spring Term 1850, His Honor Judge CALDWELL presiding.

J. G. Bynum, for the plaintiffs.

Gaither and T. R. Caldwell, for the defendant.

NASH, J. We agree with his Honor that the action cannot be sustained. The facts are as follows: Lyle and Clayton placed in the hands of an attorney certain notes for collection. Suits were brought, moneys made and the moneys paid into the office of the clerk of the Court.—During the pendency of the action, the receipt given by the attorney, on receiving the notes, was, by the plaintiff, transferred to the relators for a full consideration. A part of the money was paid by the defendant, the clerk, to the present relators. Another judgment had been obtained by one Moody in the same Court and the money also paid into the office of the clerk. The relators had purchased certain witness tickets, which were filed in the case, the amount of which, included in the costs, was

also paid in. The action is upon the official bond of the defendant, as clerk of the Court, and the breach assigned the non-payment of the money so paid into the office.— The refusal of the defendant to pay the money to the plaintiffs is no breach of the bond. Every clerk is required faithfully to pay over all moneys, received into his office, to the person or persons entitled to receive the same. The enquiry then is, who was entitled, under the law, to demand from the defendant the money claimed in this suit. Clearly, not the relators. A judgment, it has been decided, is not assignable: and the transfer of the attorney's receipt for the notes, could, at best, transfer but an equitable right to the money, when collected. The judgment still remained, in law, the property of the plaintiffs at law. These were Lyle and Clayton, and they, or their attorney at law, or their attorney in fact, were alone legally entitled to demand and receive the money from the defendant. The case is in a Court of law, where, in general, only legal interests are regarded. *Jones and Wife* v. *Blackledge*, 2 Car. L. Rep. 457; *Arrington* v. *Horn*, 2 Car. L. Rep. 631. The defendant was under no legal obligation to pay the money to the relators, and his refusal to do so was no breach of his bond, for which they can sue.

Per Curiam. Judgment affirmed.

ANDREW J. PATTON *vs.* JOHN R. DYKE & AL.

In an action, in which is involved the *bona fides* of a contract for the sale of goods, the declaration of the vendors, at the time of the sale, that they were indebted to the vendee and an agreement between the parties that the price of the goods or a part of it was to be credited on that debt, is competent evidence, though the action is against third persons for seizing and converting the goods.

So, also, the declaration of the vendors, made some time before the contract, to another person besides the vendee, that they were indebted to the vendee, is competent evidence to prove such indebtedness in an action by the vendee against third persons.

The case of *Askew* v. *Reynolds*, 1 Dev. & Bat. 370, cited and approved.

Appeal from the Superior Court of Law of Macon County, at the Spring Term 1850, his Honor Judge ELLIS presiding.

J. Baxter, for the plaintiff.

N. W. Woodfin and J. W. Woodfin, for the defendants.

NASH, J. The plaintiff complains, that the defendants took and converted to their use a quantity of goods, which were his property. The case is as follows: Colbert & Morris, merchants in trade, were the owners of the goods and sold them to the plaintiff for the sum of four hundred and fifty dollars, which was an advance of twenty per cent. on what they cost—a part of the purchase money was paid at the time of sale. A witness by the name of Morris, stated that he was present at the sale, as agent of his son, who was one of the owners of the goods—and that it was agreed between the parties, that, after deducting the cash payment, the balance should be credited

by the plaintiff on a debt due him by the firm, for money advanced by him to them in Charleston, South Carolina, to pay debts due by the firm, for which they were there arrested. He further stated, that he had, before that time, heard both the members of the firm say, they owed the plaintiff for money advanced by him for them on that occasion, and the debt was spoken of by the parties at the time of the sale. All this testimony was objected to by the defendants. The defendants were officers of the County of Macon, confessed the conversion of the goods, and justified under several executions, some of which were issued by magistrates to collect debts due by the firm, and some issuing from Court, against Colbert, one of the firm, for debts due by him individually. The firm of Colbert & Morris was in failing circumstances, at the time the sale was made to the plaintiff. On the part of the defendants, it was contended, that the sale to the plaintiff was fraudulent, as to all the creditors, not being for a valuable consideration and *bona fide*. The Court instructed the jury, that the executions created no such lien upon the goods, as prevented the sale to the plaintiff, and that the question of fraud was one for their decision —and if they believed the sale to the plaintiff was *bona fide* and for a valuable consideration, going to pay a debt due by the firm, they should find for the plaintiff, otherwise for the defendants. The jury found a verdict for the plaintiff. We concur with his Honor in the instructions given. The executions in the hands of the officers formed no justification, unless the sale to the plaintiff was fraudulent. If it was so, it was void, as to the creditors of Colbert & Morris, and left the goods liable to these executions. Two questions are presented by the record; the one is the *bona fides* of the sale, and the other is, the admissibility of the declaration of the parties at the time of the sale and before, as to the indebtedness of the firm to the plaintiff. His Honor committed no error, in admit-

ting the declaration of the parties at the time of the sale; it was a part of the transaction. The plaintiff paid a part of the purchase money, at the time of the contract, and the disposition of the remainder was a necessary enquiry, as constituting a part of the agreement. Was it to be paid then, or was the purchaser to have a credit for it; if so, how long and what assurance was he to give? his bond or his note, or the bond or note of a third person? or was it to be paid in specified articles or how else was it to be discharged? All these might have been the subject of arrangement, and which one of them might have been selected, would have constituted a part of the contract of sale—and while it remained in parol, might be proved by evidence of what was spoken and agreed by the parties at the time. It *was* then competent for the plaintiff to prove, how and in what manner, he was to pay the balance of the price of the goods, and the agreement was, that the vendors were to be credited for it on a debt due by them to him, for money, before that time, paid by him in the City of Charleston, to prevent them from an arrest for a debt due by the firm. The partners, at the same time, acknowledged their indebtedness and stated how it had been incurred. The plaintiff was entitled to the whole of what was said by the parties in making the contract. See the reasoning of the Court in the case of *Askew* v. *Reynolds*, 1 Dev. & Bat. 370. The declarations of the parties, made before the time of the sale, admitting their indebtedness to the plaintiff, being made *ante litem* and before any movement was made, or, as far as the case discloses, was thought of, towards the sale of the goods to the plaintiff, in a question impeaching the fairness of that transaction, was, certainly, evidence of the fact, it being against their interest at the time it was made. If these declarations were competent evidence and the facts disclosed by them were believed by the jury to be true, then, the only remaining question is answered. The sale was

made *bona fide*, and there was a valuable consideration for the contract.

PER CURIAM. Judgment affirmed.

PHILIP P. HARSHAW *vs.* WILLIAM CROW.

The preamble to a warrant constitutes a part of it, and where it sets out, in apt words, the offence, for which, as the plaintiff alleged, the defendant had incurred the penalty sued for, the form is a proper one.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term 1850, his Honor, Judge ELLIS, presiding.

This was a suit by warrant for $50, the penalty for burning the plaintiff's woods. The warrant was as follows:

STATE OF NORTH CAROLINA, }
CHEROKEE COUNTY. }

To any lawful officer to execute and return:

Whereas, Philip P. Harshaw complains to me, William Manchester, a justice of the peace of said County, that William Crow, on the —— day of April last past, did set fire to a certain piece of woods of complainant and adjoining the wood lands of complainant and others, without previously giving two day's notice to the owners of said adjoining wood lands, contrary to the act of Assembly in such case made and provided, whereby he has

forfeited the sum of fifty dollars for the said offence:— This is therefore to command you to take the body of the said William Crow and him have before me or some other justice of the said County to answer the premises and render to the said Harshaw the said sum of fifty dollars, which he owes and unjustly detains. Herein fail not. Given under my hand and seal this 21st of November 1849.

Signed, WM. MANCHESTER, [SEAL.]

The warrant was tried before a magistrate and came up by successive appeals to the Superior Court. The jury there found a verdict for the plaintiff, and the defendant moved in arrest of judgment, and, being sustained in his motion, the plaintiff appealed.

No counsel for the plaintiff.

J. W. Woodfin, for the defendant.

PEARSON, J. This was a warrant for $50, the penalty for burning the plaintiff's woods. The jury found in favor of the plaintiff, but the judge below arrested the judgment, being of opinion, that "the preamble constituted no part of the warrant." In this, we think there was error. The recital or preamble, as it is called, does constitute a part of the warrant and sets out, in apt words, the offence, for which, as the plaintiff alleged, the defendant had incurred the penalty sued for.

The warrant is a very good form. We can see but one objection to it, as applied to this case; and that is, the negative averment as to two day's notice not having been given to the owners of adjoining wood land. The defendant set fire to the plaintiff's wood land, and in such case he incurred the penalty, without reference to the fact of notice. That provision only applies to cases, where one sets fire to *his own wood land*. This averment, however,

is mere surplusage, and has no effect upon the validity of the warrant.

The judgment must be reversed, and there must be judgment for the plaintiff.

PER CURIAM Judgment accordingly.

THE STATE vs. FRANCIS B. WORLEY.

A seal is essential to a warrant, issued by a magistrate to arrest a person for a criminal offence, and, if there be no seal, the warrant is void, and the defendant is justified in resisting its execution.

Whether there be a seal or not is a mixed question of law and fact, to be decided by the judge below, and from his decision there is no appeal to this Court. The cases of *Welch* v. *Scott*, 5 Ired. 72, and *State* v. *Isham*, 3 Hawks 185, cited and approved.

Appeal from the Superior Court of Law of Cleaveland County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

Attorney General, for the State.
Henry, for the defendant.

NASH, J. The defendant was indicted for an assault and battery upon an officer. A search warrant was issued by a justice of the peace, upon due information made to him, commanding the officer "to search the premises of the defendant" (for certain stolen property) "and, if found there, to bring it and the defendant before the magistrate, granting the warrant, or some other justice of the

peace of the County, to be dealt with according to law. Given under my hand and seal this 30th Sept. 1849.

JAS. SHARP," [J. P.]

This warrant was placed in the hands of the prosecutor, who was an officer of the County, and, in endeavoring to execute it, the assault was made. For the defendant it was insisted, that the warrant was void for want of a seal and for other defects apparent upon its face.—The Court was of opinion that it had a seal attached, and that it was otherwise sufficient in law to justify the officer in arresting the defendant. The jury found the defendant guilty, and from the judgment on the verdict the defendant appealed.

It is certain, a seal is essential to every warrant, issued by a magistrate to arrest any person upon a criminal charge. If there be no seal, the precept is void and affords no protection to the officer attempting to execute it; and, if its execution is resisted by the defendant, he is guilty of no offence against the law, though, in doing so, the person of the officer be assaulted. *Welch* v. *Scott*, 5 Ired. 72. The question, whether there be a seal or not, attached to the warrant, is one exclusively for the judge, who tries the cause, to be decided by him upon inspection, and is a mixed one of law and fact. In this case his Honor below decided, that the scroll affixed to the name of the magistrate, and certified by him to be his seal, was a seal. Thereby the *fact* of its existence was adjudicated. This Court is established to correct errors of law, and not errors of fact. If, therefore, the judge had erred in his judgment in the matter of fact submitted to him, we could not correct the error. *State* v. *Isham*, 3 Hawks. 185. What were the other defects in the warrant, upon which the defendant relied, we are not informed, and are not able, upon an inspection of it, to ascertain.

PER CURIAM. Judgment affirmed.

ELIJAH MATTHEWS vs. PENNILL GILREATH & AL.

Under the act of 1848, relating to the County of Polk, all the records, transferred to the Superior Court of Polk from the County of Rutherford are directed to be returned to the Superior Court of Rutherford County, the act of 1846 establishing the Superior Courts in Polk having been repealed by the act of 1848; *Held*, that the Superior Court of Rutherford had the right to issue an execution on a judgment, rendered in the County of Polk, while the latter had jurisdiction, as to cases from the former county, removed by the act of 1846 and retransferred by the act of 1848.

Appeal from the Superior Court of Law of Rutherford County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

This is a motion, made by the defendants in Rutherford Superior Court, to set aside an execution issued from that Court against them: and these are the facts, on which it is founded. In 1846 acts were passed, to establish a County, called Polk, out of parts of Rutherford and Henderson Counties, and also establishing Superior and County Courts therein. In 1848 those acts were repealed, and in a supplemental act, ch. 19, the Clerk of the Superior Court of Polk is required to make out a transcript of all suits pending therein, and where either or both of the parties live in that part of Polk, which was taken from Rutherford, to deliver the same, with the original papers relating to such transcripts, to the Clerk of the Superior Court of Rutherford; with a similar requisition, to deliver to the Clerk of the Superior Court of Henderson the transcripts of the cases, in which the parties live in that portion, which was taken from Henderson. The third sec-

tion of the act further requires of the Clerk of the Superior Court of Polk, to deliver "all the records and dockets belonging to his office to the Clerk of the Superior Court of Rutherford." By the 15th section, it is further enacted, that the Clerks of the Superior Courts of Rutherford and Henderson, respectively, shall have the same power and authority over the records and papers, which are hereby required to be transferred to their offices, as if such records and papers had before belonged to the offices of the Clerks of Rutherford and Henderson. The execution in question is a *fieri facias* on a judgment rendered in Polk Superior Court in 1848, of which the original record was removed into the Superior Court of Rutherford, and which, according to the record, remained unsatisfied. The alleged ground of the motion was, that the Clerk of Rutherford Superior Court could not issue a *fieri facias* upon a judgment rendered in the Superior Court of Polk. The Court refused the motion but allowed the defendants to appeal.

J. G. Bynum, for the plaintiff.
N. W. Woodfin, for the defendant.

Ruffin, C. J. The Legislature is competent to direct, where the records shall be kept and what officers shall from time to time issue lawful process upon them. The only question, therefore, is, whether, by the proper construction of the act of 1848, executions are to be issued from the Superior Court of Rutherford on judgments rendered in the former Superior Court of Polk. It would seem, that there could not be a doubt upon it. The acts abolish Polk County, its Courts and Clerk's offices, excepting only, that the Clerk is kept in office until he can perform the duty of transferring the records, as directed in the act. The provisions upon that subject are not the same in respect to both Counties. They are, that of the

suits pending, transcripts shall be made, and, together with the original papers, relating to the respective transcripts, shall be delivered by the Clerk of Polk in the following manner: that is, to the Clerk of Henderson, those in which the parties live in Henderson, and to the Clerk of Rutherford those, in which either of the parties lives in the latter County. In that mode, are disposed of all the undecided cases. Then, as to the cases, which had been decided, the provision is plenary, with the exception of the original papers relating to pending suits, which go with the respective transcripts of those suits—"all the records and dockets belonging to his office" are to be delivered by the Clerk of Polk to the Clerk of Rutherford Superior Court. It obviously follows, that the execution is to issue from the Court, in which the record of the judgment is; it can issue from no other; and, as the Legislature could not mean, if within its power, to deprive the citizen of the benefit of his judgment rendered in Polk, he must be entitled to execution on it from the Court of Rutherford. That is rendered still clearer, if possible, by the command in the 15th section to the Clerks in Henderson and Rutherford to act on those records and papers, thus transferred, as if such records and papers had originally belonged to their offices; which, no doubt, was intended to enable and require those Clerks to proceed immediately in those cases, without any special direction of the Court, according to the course of the office. It must, therefore, be certified, that there was no error in refusing the motion.

PER CURIAM. Ordered accordingly.

EDWARD RIPPEY vs. W. J. T. MILLER, ADM'R., &c.

In an action against the representative of a deceased, who had committed a trespass on the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages.

Appeal from the Superior Court of Law of Cleaveland County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

The action is trespass *quare clausum fregit*, and was tried on the general issue. The declaration and evidence were of an entry on the plaintiff's land by the defendant's testator, secretly in the night, and maliciously burning a cotton gin-house and divers articles therein, and killing a horse; and evidence was further given for the plaintiff, that the house and other property were of the value of $750. The counsel for the defendant, thereupon insisted before the jury, that he, being an executor, was liable only for damages to the value of the property destroyed. But, in summing up, his Honor instructed the jury, that where a trespass is commited, under circumstances of aggravation, by a person moved thereto by malice, the jury was not restricted to the value of the property in assessing the damages against the wrong doer or against his executor, but they might, if they thought proper, give vindictive damages against either. Damages of $1500 were given; and the defendant appealed from the judgment.

J. G. Bynum and Landers, for the plaintiff.

Gaither, with whom was *Alexander*, for the defendant, submitted the following authorities:

Revised Statutes, ch. 2d, sec. 11th, p. 57th. *Brown* v. *Blick*, action of waste; see Judge Taylor's remarks on the Statute of Gloucester, at p. 518. 3 *Murphy* 511.—*McLure* v. *Miller*, action for the seduction of his daughter. 4 *Hawks*. 138. *Wylie* v. *Smitherman*, trespass *quare clausum fregit*. 8 *Ired*. 236.

Ruffin, C. J. As the case appeared, it would have been a proper one for insisting to the jury on vindictive damages against the trespasser. The question is, whether damages of that character can be given against his representative. The Court is of opinion that they cannot. An action for a *tort* was lost at the common law by the death of either party, the injured or the injurer, upon the maxim, *actio personalis moritur cum persona*.—That, in some cases, produced great hardship; as *torts* differ in their nature, some consisting of violence and insult to the person or injury to the character and feelings; and, for such, ordinarily, there is no precise measure of damages, but they are in their nature vindictive, and in a great degree lie in the discretion of a jury. Others consist of injuries to or in respect of property; and for them, the natural and legal redress is to restore the value of the property destroyed, or to the extent of the deterioration of the property.

In cases of the former class, the death of a party prevents the great objects of an action from being attained, while it has no such effect in the latter, as the object then is to reimburse, out of the estate of the wrong-doer, the loss, which the other party has sustained in his estate by the act of the wrong-doer; and it is plainly just that he should thus be made whole. It is true, the common law put both cases on the same ground and gave no remedy

in either. But upon the distinction mentioned, the legislature of this State in 1799 and 1805 passed two acts, which were incorporated into one section of the Revised Statutes of 1836, whereby, amongst other things, it is enacted, that actions of trespass and trespass on the case shall survive against executors, when they are not merely vindictive, that is, where property either real or personal is in contest, or where such actions are brought for damages done to such property. Rev. St. ch. 2, sec. 10. The affirmative language used and the negative provision respecting vindictive actions, taken together, show the principle of the enactment to be, that in respect to a loss sustained by one in his property from the wrongful act of another, there shall be a commensurate redress in damages, notwithstanding the death of either or both of the parties. In respect, however, to injuries to the person or to the feelings, before alluded to, and for which such actions only lie, as in their nature are vindictive, it was deemed wisest to leave the law as it was before. The present case presents an instance of a third class of cases; in which the action is for damages done to property, and, to that extent, cannot be said to be vindictive, and, under the statute, undoubtedly survives. But if the action were between the original parties, the jury might go beyond the loss to the plaintiff in his estate and assess the damages in reference to the circumstances of insult or other aggravation—which are called in the books, by the various names of exemplary, or vindictive damages, or smart money; all signifying much the same, and denoting that such damages are not for the injury to the property, that is, merely therefor, but for something over and above that. Now with regard to damages of this latter character, the Court thinks the action of trespass is not preserved by the act after the death of one of the parties. For, as the act gives the action between executors for property or damages done to property, and in those cases only, and, more-

over, is particular to exclude from its operation vindictive actions, it seems to be a necessary construction, that, however it might be between the original parties, yet, as between the representatives, the action is not to survive in respect to its vindictive features, but only as far as to give reparation for the pecuniary loss, by reason of the destruction of the property or damage done to it. As far as an action is vindictive, there is the same reason, why it should not survive, as there is against one purely vindictive surviving at all. This seems to be the unavoidable interpretation of the act as applicable to such a case, and it is believed, there is no decision to the contrary.—It was indeed urged in the argument, that a different doctrine was laid dawn in *Wylie* v. *Smitherman*, 8 Ire. 236. But that is a mistake; for certainly, no such thing was intended, and what was said there meant only, that, even assuming that to be a proper case for vindictive damages, it was erroneous in the Court to lay down their measure, instead of leaving that to the jury. The point whether an administrator was liable for vindictive damages, was not considered, nor in truth, did it occur to the Court.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE TO THE USE OF JACOB RANSOM & AL. vs. ROBERT THOMAS & AL.

It is the rule in this country to apply payments to the debt, for which the security is the most precarious, when no application is made by the party who pays.

The cases of *Moss* v. *Adams*, 4 Ire. Eq. 42, and *State* v. *Thomas*, 10 Ire 165, cited and approved.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

This is an action on the official bond of the defendant, executed by him as sheriff of Henderson, for the default of his deputy, J. J. Summey. The breaches asigned were, that the said deputy had not used due diligence in collecting certain debts, placed in his hands for collection, and, in the second place, had collected the same and refused, on demand, to pay over the money to the relators. The execution of the bond declared on was admitted and that the said Summey was the defendant's deputy during his official term, commeneing in September 1842. The relators read in evidence a receipt signed by the said Summey, for sundry notes, which was in the usual form of officers' receipts for notes given them to collect. It was admitted, that all the debts set forth in the same were on solvent persons, except the McCarson debt, and for that the relators did not claim to recover. The defendant's counsel admitted, that the debts had been all collected, except the said McCarson debt, and the debt on Brittain & Johnson. The defendants then shewed, that

the said deputy had paid the relators $50 on the 28th of July 1843; $437 43 on the 2nd of November 1843; $100 on the 2nd of June 1844; $85 on the 7th of July 1844; $40 on the 26th of December 1845, and $20 on the 2nd of November 1846.

The relators then called William Brittain, who proved, that he paid said Summey on the debt due from him and Johnson mentioned in the said receipt, in February or March 1843, something over two hundred dollars in corn, and $40 in claims on the County of Henderson, and, in the fall of said year, he paid said Summey $90 in cattle and $40 in County claims, and, in the fall of 1844, paid off the balance of said note in cattle, and took it up. The credits were endorsed thereon from time to time according to the amount paid.

It appeared on the trial, that the relators resided in Lincolnton, some seventy miles from Henderson. There was no evidence tending to shew, that the relators had authorised the said Summey to collect the debt on Brittain & Johnson in any thing but money, or that they knew of the kind of payments made thereon, or that they ratified the same thereafter. The relators offered no proof to shew, that any of the other debts set forth in the said receipt had been collected, except the said Brittain & Johnson debt. There was no evidence of the application of the money paid by the said Summey to the relators, nor any evidence of any directions given by him as to its application. The counsel of the relators, in opening the case, stated that the money paid by the said Summey had been applied to the extinguishment of the Brittain & Johnson debt, and this suit was brought for the default of the said Summey in relation to the other debts set forth in the said receipt.

The defendant's counsel insisted, that the money paid ought not to be applied to the Brittain & Johnson debt, there being no evidence, that the said Summey had conver-

ted the property by him secured into money, when he made the payments to the relators; that it made no difference, whether he received the property with or without authority, the money paid could not be presumed to be the proceeds of the said property, unless there was evidence to shew, that he had received money for the property, before the payments were made. The Court charged, that if Summey, the deputy, received property and County claims in payment of the Brittain & Johnson debt, without authority from the relators and there was no subsequent ratification by them, then he became their debtor to the amount of the said debt, and it was not material, whether he converted the same into money before he made the payments to the relators or not. And the Court further charged, as it did not appear that any application of the money had been made by the relators or directed by the said Summey, that the money proved to have been paid ought to be applied, first to the Brittain & Johnson debt, and, if there was a balance, then to the debts set forth in the said receipt, which were within the jurisdiction of a justice of the peace and on persons admitted to be solvent. The jury found according to the charge of the Court. A new trial was moved for and refused, judgment rendered on the verdict, and the defendant appealed.

J. Baxter, for the plaintiff.
J. W. Woodfin, for the defendant.

Pearson, J. This case was before the Court at its last term and is reported 10 Ire. 165. It was then held, that no judgment could be rendered on the special verdict, because it did not appear, that any of the claims had been collected, so as to make a debt or demand "to which the payments could be applied;" so the question as to the ap-

plication of money, which was intended to be presented, did not arise.

But it was intimated, that if the deputy had collected any thing on the note of Brittain and Johnson, the payments ought, first, to be applied to that demand, because it is the rule in this country, to apply payments to the debt, for which the security is the most precarious, when no application is made by the party who pays. *Moss* v. *Adams*, 4 Ire. Eq. 42, was cited in support of the position. Upon the second trial, it was proven, that the deputy had collected the whole of the note of Brittain & Johnson; not, it is true, in money, but in horses and cattle, which he received as money, and gave up to them their note, and the Judge in the Court below held, that this was such a collection of the claim, as to make it a debt or demand, to which payments could be applied, and that, in the absence of any proof, that any collections had been made, upon any of the other claims and paid over to the relators, it was proper to apply the payments to the extinguishment of the claim upon the bond of Brittain & Johnson, although it was not proven, that the deputy had sold the horses, cattle, &c. and realized the money from such sales. We see no error in this opinion; it fully accords with the intimation given in the case, when it was last before us, which was in accordance with the law, as held in *Moss* v. *Adams*.

Per Curiam. Judgment affirmed.

DEN ON DEMISE OF ELIJAH CHASTIEN vs. DANIEL PHILIPS.

Where a deed was delivered merely as an escrow, and never absolutely, was not registered and was finally destroyed by the maker, by the consent of the party, to whom it purported to be made, it cannot constitute a color of title.

Appeal from the Superior Court of Law of Haywood County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

This action was commenced September 29th. 1847, and the declaration is on the several demises of Elijah Chastien and Samuel Higdon. On the trial, a title was deduced from the State to Chastien, and it was shewn that, early in 1841, he conveyed in fee to the other lessor. On the part of the defendant, evidence was then given, that. prior to 1839, Chastien contracted to sell the premises in fee to Leonard Higdon, and gave his bond or covenant to make the conveyance, when the purchase money should be paid: that the price was fully paid, and that, in the latter part of that year or early in 1840, the said Leonard sent one Coward to Chastien, who lived in South Carolina, to get a deed, and that Chastien executed a deed, but, in consequence of Leonard Higdon's omission to send Chastien's covenant by Coward, he, Chastien, refused to deliver it absolutely, and put it into the hands of the said Coward, with directions to deliver the deed to the said Leonard, on his surrendering to that person the bond which Chastien had given: that Coward, upon his return, shortly thereafter, offered to deliver the deed to the said Leonard, as directed by Chastien, if he, the said Leonard,

would surrender to him the said bond or covenant; but the said Leonard refused to surrender the same or to accept the deed sent, and remarked to Coward, that he might hold on to the deed, until he should pay him a small sum, which he owed him; and that, about a year afterwards, the said deed was destroyed by Chastien, by the consent of the said Leonard, without ever having been delivered to him personally, or otherwise, than as above set forth; and, by the direction of the said Leonard, a deed was then made by Chastien to the said Samuel Higdon. Evidence was further given on the part of the defendant, that, in June 1840, certain executions issued by a justice of the peace, against the estate of the said Leonard, were levied on land, and orders of sale made thereon in the County Court, and that writs of *venditioni exponas* were then issued and the premises sold by the sheriff on the 5th of October 1840, to a person under whom the defendant claims; and, that, in December 1840, the defendant claimed the land under the title derived from the sheriff's sale, and, upon his demand, the said Leonard surrendered the possession to the defendant, who then entered, and, in July 1841, the sheriff made a deed to the purchaser, and the defendant continued in possession up to the trial. On this, the Court held, that the purchaser did not acquire a title under the sale of the sheriff, because the writs of *venditioni exponas* did not describe or include the premises. Thereupon, the counsel for the defendant insisted, that the defendant was entitled to the benefit of the possession by Leonard Higdon and that it perfected the defendant's title.

The Court instructed the jury, that, supposing the evidence to be true, it established the due delivery of the deed, so made, to Leonard Higdon by Chastien; and that the possession of the premises by the said Leonard and by the defendant together, for more than seven years after the deed was delivered to Coward by Chastien, was such

an adverse possession under color of title as vested the title in the defendant. There was a verdict for the defendant, judgment and appeal.

J. Baxter and G. W. Baxter, for the plaintiff.
N. W. Woodfin and Gaither, for the defendant.

Ruffin, C. J. As the sale and conveyance by the sheriff are to be deemed void in the present state of the case, they are to be put of our consideration, except so far as they may be color of title and enable the defendant to make a title under the statute of limitations. But he cannot do that, because the action was commenced in less than seven years from the defendant's entry, and, indeed, from the sheriff's sale. It is clear, then, that the title cannot be in the defendant, and the instruction on that point was erroneous. The title, therefore, must be in Chastien or one of the Higdons; and unless it be in Leonard Higdon, the plaintiff must recover on the demise of one of the other two persons. The Court holds, that Leonard Higdon has not the title. The deed to him, if delivered absolutely, did not pass the title, for want of registration; and, therefore, at most, it could only be color of title. Now, supposing that the possession of the defendant may be connected with that of L. Higdon, so as, together, to constitute a sufficient length of a possession, yet it cannot enure to vest the title in L. Higdon, because his possession was never adverse to Chastien, and, indeed, the supposed deed to him never, in point of law, became a deed. He entered originally as vendee under articles, and, of course, that possession was not adverse to his vendor. Its character, however, would be changed by the execution of a deed and its acceptance by him; and it has been held, that a deed, not otherwise defective, is color of title, though not registered. But it seems impossible to allow that operation to an instru-

ment, which is not only unregistered, but which never took effect as a deed—being merely an escrow and, by the consent of the party, to whom it purported to be made, destroyed by the maker before a final delivery to the party. It is true, there cannot be a delivery to the party himself as an escrow; and a deed thus delivered is absolute.

It is likewise true, that an unconditional delivery to Coward, as the agent of L. Higdon, would have made the deed complete at once. But there was, in fact, no such unconditional delivery in this case. It is no where laid down as a principle, that a delivery to one, who is the agent of the bargainee, cannot be conditional, but must be absolute, as if the delivery were to the bargainee himself. Nor can that be the law, since, after the bargainor's refusal to deliver the deed absolutely to the agent of the other party, there is no reason, why the bargainor may not make the same person his agent to take the deed, and deliver it, upon the performance of certain conditions by the other party. There is no repugnancy in such a transaction, as there is, when the delivery is directly to the party himself; and, therefore, the instrument may be allowed to operate according to the actual intention of the parties, which is always the justice of a case and to be ascertained when the intention is not contrary to law.—It is plain, then, that this deed was not delivered to Coward, as the agent of Leonard Higdon, but that it was put in his hands, as the agent of Chastien, to be delivered upon getting up the original articles of sale; and that it never was delivered to L. Higdon, but, when offered, was rejected by him. It was, therefore, no more than an escrow at any time during its existence, and it so continued, by reason of the party's own refusal to accept on the conditions specified. Now, it cannot be held, or even admitted, that L. Higdon held possession of the premises under the deed, which he had not received, but had thus explictly

rejected; and the very idea of possession under color of title is, that it is a possession taken or held by one under an instrument, which purports to convey, or under which he claims, an estate in the land.

That person never did set up any claim under the deed; but, after its execution, as before, his possession was under, and merely subsidiary to, the title of his vendor. The subsequent surrender by him of the possession to the defendant could not affect this point, under any circumstances. But, it is plain, that it proceeded altogether from a mistake of the parties, as to the validity of the sheriff's sale; for, if it had been good in other respects, it would have been effectual under the act of 1812, without regard to the deed from Chastien, as L. Higdon had, before, fully paid for the land and Chastien held upon a pure trust for him. Whether his title was legal or equitable then, he conceived himself obliged to let the purchaser from the sheriff into possession; and no inference can be drawn from that fact, which can operate one way or the other on the deed. There has not, therefore, been seven years possession, under color of title, adverse to the lessors of the plaintiff, and there ought to have been a verdict against the defendant, upon the one demise or the other.

PER CURIAM Judgment reversed and *venire de novo*.

GEORGE BROOKS *vs.* ANN JONES.

In an action for malicious prosecution, the plaintiff must shew particular malice on the part of the defendant towards him.

This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as, in this case, are apt to engender angry feelings.

Appeal from the Superior Court of Law of Buncombe County, at a Special Term in February 1850, his Honor Judge CALDWELL presiding.

This is a suit for a malicious prosecution. The defendant sued out a State's warrant against the plaintiff and others, charging them with shooting and cutting her horses, in the night time, which was tried before a magistrate and dismissed. On the trial the defendant introduced testimony, tending to shew that she had probable cause for sueing out the State's warrant. The Court charged the jury, that, if the facts deposed to by the witnesses, were true, there was probable cause, and further charged, that if they did not believe the witnesses, then, to entitle the plaintiff to recover in this action, he must shew express malice on the part of the defendant. The defendant's counsel asked the Court to charge the jury, what was meant by express malice, and the Court said it meant ill will, grudge and to revenge herself. The only evidence on the part of the plaintiff, as to malice, was the existence of an action of trespass, instituted by the defendant and her son against the plaintiff and his father in law.

The jury returned a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

J. Baxter, for the plaintiff.

J. W. Woodfin, for the defendant.

PEARSON, J. His Honor was of opinion, that the plaintiff must shew express malice on the part of the defendant. Being requested to explain what was meant by express malice, he replied, "ill will—grudge—to revenge herself." To this the plaintiff excepts.

If his Honor had said particular, instead of express, malice, his meaning would have been more clearly conveyed.

General malice is wickedness, a disposition to do wrong, a "black and diabolical heart, regardless of social duty and fatally bent on mischief." This is malice against mankind, and was the definition, insisted on by the plaintiff's counsel, in the argument before us.

Particular malice is ill will, grudge, a desire to be revenged on a particular person, which is the definition given by his Honor.

The case, then, as we infer, was intended to present this question. In an action for malicious prosecution, is it sufficient for the plaintiff to shew, that the defendant, in instituting the prosecution, was influenced by general malice, or must he shew, that the defendant had particular malice against him? His Honor thought the plaintiff must shew particular malice, on the part of the defendant, towards him. We concur in this opinion. 1 *Step. nisi prius*, 2295.

This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as that set out in the conclusion of the case

—the pendency of a law suit between the parties, which is apt to engender angry feelings.

We do not understand from the manner, in which the case is made up, and it was not contended in the argument, that his Honor meant to lay down the position, or was so understood, by the use of the term "express malice," that the particular malice, necessary to support the action, must be proven by positive testimony of ill will, and that it could not be inferred by the jury, from a want of probable cause or other circumstances. When there is a total want of probable cause, the jury will infer malice, almost of necessity; as a prosecution, wholly groundless, cannot be accounted for in any other way.

PER CURIAM. Judgment affirmed.

JOHN BUTTS *vs.* ANDREW J. PATTON.

Under the statute of 1826, the presumption of the payment or satisfaction of a judgment does not arise, until ten years after the plaintiff has ceased to prosecute his judgment, that is, until ten years after the day of the return of his last execution.

The plea of payment to an action on a judgment, &c., is sufficient to cover the defence of a presumption of payment or abandonment of claim under our act of 1826.

The case of *Gilky* v. *Dickinson*, 2 Hawks. 341, cited and approved.

Appeal from the Superior Court of Law of Macon County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

Gaither, N. W. Woodfin and J. W. Woodfin, for the plaintiff.

J. Baxter, for the defendant.

NASH, J. The action is in debt, and brought on a judgment, rendered against the defendant in favor of the plaintiff in the State of Georgia. That judgment was obtained at October Term 1837 of Habersham Superior Court, and an execution issued from that Term to the April Term 1838 of the said Court. On the 20th November 1837 the sheriff returned the writ, with the endorsement "no property." No other execution issued on the judgment. The writ, in this case, issued on the 4th of March 1848. The defendant, among other defences, pleaded "payment" and it was insisted by him, that more than ten years had elapsed since the judgment was obtained and before the issuing of the writ in this case. The plaintiff insisted, that the presumption of payment did not arise —first, because ten years had not elapsed from the term of the Court, to which the *fi. fa.* issued on the said judgment was made returnable and the commencement of this suit; secondly, because the statute, giving the presumption, was not sufficiently pleaded; and thirdly, because the statute did not apply to a judgment obtained in Georgia, where no such statute existed. The Court was of opinion, that, from the lapse of time, a presumption arose, that the judgment, upon which this action is brought, was paid, and that presumption operated upon a judgment obtained in another State, as well as one obtained in this. The jury found a verdict for the defendant and the plaintiff appealed.

Under the view we have taken of this case, it is not necessary for us to express any opinion upon the question, whether the Act of 1826 applies to a judgment obtained in a sister State, for, whether it does or not, the presumption of payment does not arise here. The act provides,

that the presumption of payment or satisfaction of all judgments, &c., shall arise within ten years after the cause of action on the same accrues, &c. Rev. St. ch. 65, sec. 19. The question then is, from what period does the act begin to operate? Literally, from the rendition of the judgment, for then the plaintiff can bring his action upon it. Was that the meaning of the Legislature?—We presume not, for the act goes on to provide, that the action shall be brought under the same rules, regulations and restrictions, as now exist at law. The statute of limitations does not apply to either bonds or judgments. With respect to the former, the doctrine of twenty years, raising a presumption of payment, was at an early period laid down by Lord HALE, who thought it merely a circumstance from which a jury might presume payment. The rule was followed, until at length it became the settled law of the Court. It was, however, a presumption, which ceased to exist, when a sufficient cause was shewn, why the action had not been sooner brought. Thus, when it is shewn that the debtor has been insolvent and unable to pay. *Hull* v. *Horace*. Cow. 109. So when a receipt for interest is endorsed on the bond by the payee, if it appears to have made at a period, when it was not the interest of the payee to make it, as when the twenty years had not elapsed at the time of the endorsement.—*Tucker* v. *Crisp*, Sh. 827. *Rose* v. *Bryant*, 2 Camp. N. P. 321. So when a demand has been made within the twenty years. *Oswald* v. *Legh*, 1st Term. Rep. 270.

The principle, established by these cases, is, that when the plaintiff shows that he could have derived no benefit by bringing his action sooner, or that the defendant has, within the twenty years, acknowledged the debt to be a subsisting one, by either paying interest on it, or by promising to pay it, or that, within the prescribed period, he, the plaintiff, has demanded payment, in other words has been endeavoring to get his debt paid, the presump-

tion of payment will not arise. Such were the rules and regulations, governing the presumption of payment at common law upon the lapse of time. In this case, the judgment was obtained at October term 1837 of the Court. From that term an execution issued, returnable to April term 1838. The legal time, which that execution had to run, was six months, to-wit, "until the first day of the Court in April;" and in contemplation of law, up to that time, the plaintiff was endeavoring to collect his judgment. So far as his rights were concerned, in this particular, the return of it by the officer in November 1837 had no effect. It was the act of the officer, voluntary on his part, and done, most probably, to free himself from the custody of the process. As evidence, that its return did not affect the rights of the plaintiff, on the question we are now considering, if he had caused an *alias fi. fa.* to issue from the April term 1838 of Habersham Superior Court, the law would have considered it so connected with the preceding one, that the defendant would have had no power to dispose of his property, between the time, when the first writ was actually returned and the issuing of the *alias*, so as to defeat the latter. The lien, created by the original, would have been continued in the *alias*. *Gilky* v. *Dickinson*, 2 Haw. 341. In law, then, the plaintiff was endeavoring to enforce his judgment up to April term 1838, of the Court, in which it was obtained. The time specified in the act did not expire until April 1848. The writ in this suit was issued in March of that year. Suppose that executions had regularly issued from time to time of Habersham Superior Court, could it be pretended, that a presumption of payment or of abandonment of his claim by the plaintiff could have arisen? Very clearly not. And why not? Simply, because, it would be manifest, he had not abandoned his claim, which would rebut the idea of a payment. So here, ten years have not elapsed, since the plaintiff ceased

to prosecute his claim under his judgment and the issuing of his writ. The legal presumption authorised by the act of 1826 does not arise in the case.

By the plaintiff, it is further objected that the statute is not sufficiently pleaded. We think, the plea of payment is sufficient; the statute need not be pleaded; it only raises a presumption, which is evidence under the plea of payment.

PER CURIAM. Judgment reversed and *venire de novo*.

GEORGE PLATT vs. F. W. POTTS & AL.

A judgment, either before a magistrate or in a court of record, is not the subject of an action of trover and conversion; nor is a note, on which a judgment has been obtained, because it is merged in the judgment and is defunct.

Appeal from the Superior Court of Law of Haywood County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

N. W. Woodfin, for the plaintiff.
Henry and J. W. Woodfin, for the defendant.

PEARSON, J. This was trover. One count was for the conversion of a magistrate's judgment for $100 against one Tulbright: The other was for the conversion of a note for $100 on said Tulbright. The proof was, that Tulbright had given the plaintiff a promissory note for

$100. The plaintiff, by his agent, endorsed the note to one Allen, in anticipation of a trade, which was not concluded, and the plaintiff then handed the note to the defendant, Potts, a constable, for collection, without striking out the endorsement to Allen. Potts took a judgment against Tulbright on the note, and afterwards sold the judgment to the other defendant, Penland. The defendants, upon demand, refused to give up to the plaintiff either the note or the judgment; he then brought this action.

The judge in the court below was of opinion, that the plaintiff could not recover on the first count, because "a judgment," of a magistrate was not a thing, that could be recovered in trover. This is settled. *Cobb* v. *Cunningham*, 6 Ire. 368. But he was of opinion, that the plaintiff could recover for the conversion of the note, "if the jury was of opinion that there had been a conversion of the note by the defendants; either by procuring a judgment to be rendered on it, or otherwise." To this part of the charge, the defendants except, and we think the exception well founded.

There was no wrongful conversion of the note, by taking a judgment on it, in the name of Allen. The endorsement passed the legal interest to him, and it was the plaintiff's fault not to strike out the endorsement, and, although the beneficial interest, according to the facts of the case, was still in the plaintiff, the defendant, Potts, did nothing more than his duty in taking the judgment as he did. The judgment nullified the note, and it was, therefore, of no force or effect, and ought to have been cancelled by the magistrate and filed away by him, and, in strictness, he ought also to have kept the judgment (or rather the paper on which the judgment was written,) as evidence of his adjudication, in which both the plaintiff and the defendant were interested, but to which neither of them had any right, because it ought to

be kept by the magistrate, so as to enable him to make a due return if a writ of *recordari* should issue. The rights of the plaintiff could be enforced by issuing an execution on a separate piece of paper, and the rights of the defendants (if he should ever be sued again, for the same cause,) could be protected by a reference to the judgment, &c., still remaining in the hands of the magistrate, as a *quasi* record.

We, therefore, do not concur in the opinion, that a note, after a judgment has been rendered on it in the name of the apparent legal owner, can be the subject of an action of trover. A judgment is a thing merely in contemplation of law, and trover will not lie for its conversion, whether it be the judgment of a court of record or of a magistrate. A note, after judgment has been taken on it, is defunct, has no existence and is not a thing, either in fact or in contemplation of law, and therefore trover cannot be sustained.

Per Curiam. Judgment reversed and *venire de novo*.

JOSEPH COCKERHAM *vs.* JOHN NIXON.

As soon as the owner of an animal knows or has good reason to believe, that he is likely to do mischief, he must take care of him and be responsible for any injury that he may inflict; and it makes no difference, whether this ground of suspicion arises from one act or from repeated acts.

The act done, however, must be such as to furnish a reasonable inference, that the animal is likely to commit an act of the *kind complained of*: this is a matter to be decided by the jury and not by the court.

Appeal from the Superior Court of Law of Surry County, at the Spring Term 1850, his Honor Judge DICK presiding.

H. C. Jones, for the plaintiff.
Boyden, for the defendant.

PEARSON, J. This was a case, for an injury done to the plaintiff's horse by the defendant's bull. The plaintiff proved, that a bull of the defendant, while running at large, gored his horse and killed it. One Cannady swore, that before the horse was killed, he was giving salt to a cow, when the bull came up—whereupon the bull made after him and forced him to jump on a fence near at hand, and he stated these facts to the defendant and told him, he would have shot his bull, if he had had a gun.

The Court charged, that it was not necessary to shew, that the defendant had knowledge of a vicious habit of the animal by proof of many acts, but that knowledge of one vicious act, shewing him to be dangerous, would be sufficient to render the defendant liable, and that the testi-

mony of Cannady did bring home to the defendant such a knowledge of the vicious propensities of the animal, as would require him to prevent the animal from going at large, and, so far as this point was involved, the jury would be authorised to find for the plaintiff.

The defendant excepts to this charge. We concur in the general proposition, that the allegation in the declaration, that the bull had a vicious habit and was accustomed to do mischief, which was known to the defendant, may be sustained by proof of a single act, provided it be of such a nature and is committed under such circumstances, as to satisfy the jury, that the animal was vicious and too dangerous to be allowed to go at large. Such fact coming to the knowledge of the owner, is notice sufficient to put him in the wrong, and make him liable for the consequences of his neglect to keep the animal confined.

The cases cited by the plaintiff's counsel fully sustain this position, *Jenkins* v. *Turner*, 1 Ray. 109, 3 Car. & Pa. 138. 1 Bar. & Ald. 620. 1 Holt 617. Leigh *nisi prius* 552. Buller *nisi prius* 77. 2 Esp. Rep. 482. One act may sometimes furnish as convincing proof of the viciousness of an animal as a dozen, and the jury are, therefore, allowed to make the inference from a single act. The idea, that the owner is not liable until the mischief has been known by him to be repeated time after time, is absurd; how many horses, must the owner know his bull to have killed, before he becomes liable? The rule is, that as soon as the owner knows or has good reason to believe, that the animal is likely to do mischief, he must take care of him; it makes no difference whether this ground of suspicion arises from one act or from repeated acts. The only restriction is, that the act done, must be such as to furnish a reasonable inference, that the animal is likely to commit an act of the *kind complained of*.— This explains the case, in which it is held, that an action against the owner of a dog for killing a sheep, is not sus-

tained by proof of a *scienter*, that the dog had bitten a man, without adopting the suggestion made by the defendant's counsel, that the "old cases" favored dogs, more than useful animals. Upon the same principle, an action could not be sustained against the owner of a hog (a useful animal) for injury to the person of the plaintiff, by proof of a *scienter*, that the hog would eat young chickens and ducks.

We think, there was error in the particular proposition, laid down in reference to the effect of the testimony of Cannady.

When the owner knows or has reason to believe that an animal is dangerous, on account of a vicious propensity in him, from nature or habit, (a term used to denote an acquired as distinguished from a natural vice,) it becomes his duty to take care, that no injury is done; and he is liable for any injury, which is likely to be the result of this known vicious propensity. But whether there be sufficient evidence of this vicious propensity, whether a single act, and the attending circumstances are such, as to justify the inference, are matters, in reference to which the jury must enquire.

If a dog is known to have killed one sheep—a jury would be able, from their knowledge of that animal, to infer, that he would kill another, if an opportunity presented itself. If so, the owner would, in law, be liable. But if a dog is known to have bitten a man, a jury would not be apt to infer that he would kill a sheep, because the one act proceeds from voraciousness, the other from combativeness, and fierce dogs are not so apt to be sheep killing dogs. If a bull so far loses sight of his submission to the "dominion of man," as on one occasion to rebel and offer combat, it does not follow, as a *matter of course*, that he would be likely to attack a horse, and that fact must be decided by the jury, from the nature of the animal, the provocation and other circumstances attending the act.

It was error for the Court to decide "that the testimony of Cannady did bring home to the defendant such a knowledge of the vicious propensity of the bull," as would make him liable.

PER CURIAM. Judgment reversed and *venire de novo*.

ROBERT H. MAXWELL vs. JOHN MILLER.

One may recover in an action of covenant or assumpsit, on a bill of sale for a slave, for a warranty of the soundness of the slave, although there be no witness to the bill of sale.

Appeal from the Superior Court of Law of Mecklenburg County, at the Spring Term 1850, His Honor Judge DICK presiding.

Thompson, Boyden and Osborne, for the plaintiff.
Craig and Wilson, for the defendant.

PEARSON, J. This was assumpsit, upon the warranty of the soundness of a negro. The warranty was contained in a bill of sale, given by the defendant, to which the wife of the defendant was the only subscribing witness. The plaintiff offered to prove the hand-writing of the defendant and that of his wife, in order to establish the warranty. The Court rejected the evidence, and the plaintiff submitted to a non suit and appealed.

The objection to the reception of the evidence is, that the attestation of the defendant's wife, as a witness, is a nullity; and so the bill of sale has no attesting witness, and does not pass the title, and, for that reason, the warranty, which is an incident to the sale, is of no validity. The reply is: admitting the position, that, as between the parties, the title did not pass by the bill of sale, for want of an attesting witness, to be tenable; still, the warranty is distinct from that part of the bill of sale, which purports to pass the title; and there is no reason, why there should be an attesting witness to a covenant or contract of warranty of the soundness of a negro, nor necessity for its registration. And if a warranty be a mere incident of a sale, the title in this case might have passed by an actual delivery, without a bill of sale, and, so, there was no ground for the objection. This reply seems to be sufficient.

But it is evident, that the doctrine of warranty, as applied to real estate, has no sort of application to the warranty of the soundness of a chattel. Such a contract may be entirely distinct from, and unconnected with, a sale, and will support an action, provided there be a sufficient consideration, although there is no sale, to which it may be *incident*.

The opinion of his Honor is obviously erroneous.

The non-suit must be set aside and a *venire de novo* issue.

PER CURIAM Judgment accordingly.

WILLIAM MURPHY vs. JAMES McCOMBS.

Where a man, who is liable to militia duty, is arrested on a civil process while he is attending a militia muster, in violation of the Act of Assembly, he may plead the same in abatement.

Appeal from the Superior Court of Law of Rowan County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

A. H. Caldwell, for the plaintiff.
Craig, for the defendant.

NASH, J. The writ in this case was served on the defendant on the 26th of April. The defendant pleaded in abatement, that at the time of the service of the writ, he was attending his duty at a muster, as an officer of the militia, in the town of Salisbury, when the writ was executed. To this plea the plaintiff demurred. On the argument, it was insisted by the plaintiff, that the matter set forth in the plea could not be taken advantage of by a plea in abatement; but was proper only to set aside the return, for the reason, that such a plea went to the writ, and the complaint here was of the service.

In this we think there was error. The Act of Assembly, under which the defence is offered, expressly provides for this case. Rev. St. ch. 31. By the 32rd section it is provided, how writs and other process, except subpœnas, shall be executed and returned. The concluding paragraph of that section is as follows: "all process made re-

turnable at any other term, or executed at any other time or in any other manner, than is by this act directed, shall be adjudged void on the plea of the defendant." The 58th section of the same act directs, "It shall not be lawful for any sheriff, or other officer, to execute any writ or other process, on a Sunday, or upon any person attending his duty at a muster of the militia," &c. The law of the land, with regard to the militia, compels, under heavy penalties, all persons, who are liable to perform militia duty and have been properly enrolled, to attend musters; and the act we are considering protects them from arrest, while they are in the performance of this duty. The officers of the law are forbidden to execute writs in civil cases upon a militia man, while so engaged. The time, then, when this writ was executed, was in violation of the law; and the 53rd section directs, that the defendant shall avail himself of it by a plea. That the defendant was within the protection of the law is admitted by the demurrer. Whether, under the Act of 1836, he could have availed himself of the objection by a motion to dismiss, it is not necessary to decide.

The decision below is erroneous and must be reversed.

PER CURIAM. Demurrer overruled and judgment for the defendant.

HUGH HAMILTON *vs.* JOSEPH ELLER.

An obligation for a certain sum, payable in specific articles at a particular time and place, becomes, after it is due, necessarily an obligation payable in money, unless the defendant pleads and proves a tender of the articles, at the time and place mentioned in the contract.

Appeal from the Superior Court of Law of Buncombe County, at the Spring Term 1848, his Honor Judge BATTLE presiding.

This is an action of debt on a bond for $150, dated July 14th, 1842, and "payable January 1st, 1844, in good trading, to be valued and delivered at Eller's house." Plea, payment. Before the jury was empannelled, the defendant, upon the authority of a letter from the plaintiff to him, moved to dismiss the suit, but the Court refused the motion. In support of the issue, the defendant gave evidence, that, before the bond fell due, and while the plaintiff held it, the plaintiff and the defendant agreed, that any debts of the plaintiff to other persons, which the defendant would discharge and take up, should be allowed as payments on this bond; and the defendant then produced several justices' judgments against the plaintiff to the amount of the bond, and alleged that he paid them before the bond fell due, but gave no evidence thereof.—On the part of the plaintiff, evidence was then given, that, on the 1st of January 1844, one Deaver, to whom the plaintiff had transferred the bond, attended at Eller's house to receive payment, and Eller then tendered him some old horses and other specific articles, of the value

of $150, as then alleged by the defendant, which Deaver refused to receive, on account of their deficiency in quality.

The Court directed the jury, that the sums due on the judgments were not payments on the bond, unless the parties had applied them, or agreed to apply them, to it; and that, whether such was the fact or not, it was for them to enquire, and, in doing so, they might consider that the defendant tendered other things in discharge of the bond, after the period, at which he alleged he had paid it by taking in the judgments. The Court also instructed the jury, that, unless they should find it to have been paid, they were to consider it as a bond for $150, payable absolutely in money, and allow interest accordingly. After a verdict and judgment for the plaintiff, the defendant appealed.

N. W. Woodfin, for the plaintiff.
J. W. Woodfin, for the defendant.

RUFFIN, C. J. The motion to dismiss was not made by the plaintiff or his attorney, but by the defendant, and, as must be understood, against the will of the plaintiff at that time. The alleged letter, under which the defendant assumed the authority, is not set forth, and, hence, it cannot be seen here, that it conferred it, and that his Honor erred, supposing that the motion could be entertained under any circumstances. We do not, therefore, consider that point; which, moreover the defendant abandons, as he states, that both he and the plaintiff have been enjoined, at the suit of Deaver, from dismissing this suit.

The instructions to the jury were very indulgent to the defence, in leaving it to the jury to draw inferences to an extent not warranted by the defendant's own evidence. For he gave no evidence, that he had paid the judgments against the plaintiff; and, moreover, if he ever paid

them, he failed to show that he did so before his plea in this suit. For this latter reason, if no other, the verdict should have been against the defendant on that issue.

The instrument is an obligation for $150, and is necessarily payable in money, unless it was discharged in specific article or the due tender of them at the day and place specified, of which there was no plea.

PER CURIAM. Judgment affirmed.

PAYTON COLVERT vs. ALLEN WHITTINGTON.

In an action brought to recover a penalty for not working on a road in Wilkes County, laid off by Commissioners, under an Act passed in 1846, ch. 100, it is necessary, before a recovery can be effected, to show that the Commissioners were duly sworn as the Act directs.

Appeal from the Superior Court of Law of Wilkes County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

Boyden, for the plaintiff.

No counsel for the defendant.

NASH, J. By an act passed in 1846, ch. 100, sec. 3 and 4, commissioners were appointed "to view, lay off and improve the State Road from Alexander Church's to Payton Colvert's." The 4th section provides, "that before they shall enter upon their duties as Commissioners, they shall

take an oath, before some justice of the peace for the County of Wilkes, to view and lay off the road the best and most convenient way, having strict regard to private property as well as to the public good, and shall assess all damages, &c., and shall report the same to Wilkes County Court, &c.; and the said commissioners shall appoint an overseer and allot him the hands necessary to open the said road, &c., and the hands so allotted him shall be subject to the same fines, as in other cases is now provided by law." Under this act the commissioners proceeded to view and lay off the road, as directed, appointed the plaintiff overseer, and allotted him the necessary hands, among whom was the defendant, to open the road. This action was brought by warrant to recover from the defendant the sum of four dollars, the fine imposed by law for refusing to work as a hand in opening the road. The defendant had been duly summoned. To support his action, the plaintiff produced in evidence two papers, purporting to be reports, made to the County Court of Wilkes, of the laying off the road and the assessment of damages. Several objections were made to the plaintiff's recovery. It is deemed necessary to examine but one. It no where appears in the proceedings, that the commissioners were sworn. The act requires, that, before they enter on their duties they shall be sworn. This is required, as well in justice to the persons, whose interests may be affected by the location of the road, as to the public. It is said, that we cannot look beyond the action of the commissioners. If any action of the County Court had been required upon the return made by them, it might well be questioned, whether we could look behind it; but, here, nothing is to be done by that tribunal, but to order the payment of the damages assessed. They are not required to record the proceedings of the commissioners. We are not only at liberty, therefore, to look into these proceedings, to see that they are regular and according as the law di-

rects, but it is our duty to do so. We cannot, otherwise, ascertain the liability of the defendant to work on the road in opening it. The commissioners, under the act, have limited and special powers; and it must appear, that all has been done by them, which is required before their acts can be legal and valid. The taking of the required oath is a condition to their entering upon the discharge of their duties. This not appearing is as if it did not exist.

PER CURIAM. Judgment affirmed.

ELISHA JONES vs. MILES B. ABERNATHY.

When slaves, by a will made by a testator in South Carolina, were directed to be emancipated, and then the testator says "all the balance of my estate to belong to C J." *Held*, that C. J. could not claim these negroes at law under the residuary clause, even if the bequest for emancipation were void by the laws of South Carolina, because they did not pass by the words of the residuary clause, but only fell into the residue by the operation of the law, and C. J.'s title was only an equitable one.

Held, that this Court cannot presume, that the emancipation of slaves is void by the laws or policy of South Carolina, but that this fact should have been proved.

Appeal from the Superior Court of Law of Lincoln County, at the Spring Term 1850, his Honor Judge DICK presiding.

This is a special action on the case, tried on not guilty pleaded. On the declaration and evidence the case is as

follows: William Barry, of Fairfied District, South Carolina, by his will, which was proved there in 1823, gave several slaves, his land, and all his other property to his wife Lucy during her life. The will then proceeds thus: "after her death, my will is, that my negroes, Jub, Lid, Isaac, &c., be all emancipated, and continue under the care of Richard Harrison and John Pickett, as trustees. It is further my will, that all my lands adjoining where I now live, with all the stock and plantation tools thereon, do continue in the care and under the protection of said trustees, for the benefit and support of said Jub, Lid and their increase forever. It is further my will, that all the balance of my estate, after my wife's death, belong to Cynthia Jones." The testator appointed his wife executrix, and she qualified and died shortly before this suit was brought. During her life, the defendant had some of the slaves in his possession in this State, and then took and sold them beyond the limits of the State. For doing so this action is brought, in order to recover damages, alleged to have arisen thereupon to Cynthia Jones, who is the intestate of the plaintiff.

The Court was of opinion the plaintiff could not recover, and, in submission thereto, he suffered a non-suit and appealed.

Avery, Landers and *Thompson*, for the plaintiff.
Alexander, J. G. Bynum and *Craig*, for the defendant.

Ruffin, C. J. Without considering the question, whether a general residuary clause vests in the legatee the legal remainder in slaves, specifically given to another for life, upon the assent of the executor to the legacy for life, the Court holds this case to be against the plaintiff. For, supposing the affirmative to be true ordinarily, it is not so upon this will. The residue in the slaves is not expressly given in that clause; but they are previously

disposed of otherwise. If they form a part of the residue at all, they fall into it by operation of law merely, contrary to the wish and expectation of the testator, upon the ground, that the disposition of them, for emancipation, failed by reason of its illegality. Now, that illegality is not established. It is possible, and, perhaps, probable, that it is deemed contrary to policy in South Carolina, to allow slaves to be emancipated and remain there, and the law of that State may not permit it. But, although we know that slavery is established in South Carolina, yet, without evidence, it cannot be judicially assumed here, that a bequest for emancipation is not valid there; since a power in the owner to manumit is not so absolutely incompatible with slavery, that they cannot co-exist under the same government; and, in fact, such a power, in some form or other, has been tolerated in most countries and in the States of this Union, in which that institution prevails. But, if that were otherwise, still the right of this residuary legatee would not be a legal, but an equitable one. For, it is plain, the testator meant, that either his personal representative, or the trustees nominated in the will, should perform the office of emancipating, or procuring the emancipation, of the slaves, if any further act were necessary to effect it; and to that end, the legal title must have been intended to revert to the personal representative, upon the death of the widow, or to vest in the trustees, with the land and other property, given "for the benefit" of the slaves. If the purpose of those gifts were illegal and could not be enforced nor executed, still the gifts themselves would not be avoided, but a trust would result to the residuary legatee, upon which there can be no action at law, but only a remedy in Equity.

Per Curiam. Judgment affirmed.

C. N. WHITE vs. JOHN GIBSON.

The declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm, is not, of itself, sufficient evidence to make his co-partners liable.

The case of *Willis* v. *Hill*, 2 Dev. & Bat. 231, cited and approved.

Appeal from the Superior Court of Law of Cabarrus County, at the Spring Term 1850, his Honor Judge Dick presiding.

Avery, *Landers* and *Osborne*, for the plaintiff.
Wilson and *Coleman*, for the defendant.

Nash, J. This action is in assumpsit, to recover from the defendant the price of a mule, purchased by one Lee, who is since dead, from the plaintiff, for the use of a firm consisting of said Lee and the defendant. The copartnership was admitted, and was entered into for the purchase and sale of negroes, horses, cotton and tobacco — To prove that the mule in question was purchased for the use of the firm, the declarations of Lee were admitted in evidence. These declarations were, that he had bought a mule from the plaintiff, and at a subsequent time, when the mule was brought home, he stated that he had bought it for the use of the firm. The latter declaration was objected to by the defendant and ruled out by the Court.

The sole question now submitted is, as to the correctness of this opinion. It is a general rule of the law of evidence, that the acknowledgment of one joint contrac-

tor or partner, is evidence against all the rest, and sufficient to bind them. The principle, upon which such evidence is admissible, is the community of interest between the party making the admissions and the party to be affected by them, and the presumption, that the former would not make an acknowledgement against his own interest. 2*nd Star. on Ev.* 26 *and* 553. If, therefore, it appears that it is the interest of the party, making the admission, to throw the burden of the contract on the firm, his acknowledgement cannot be received upon the well known rule, that interest in a cause will exclude a witness. The mule in this case was purchased by Lee, without, at the time, disclosing the fact (if it was so) that the contract was made for the firm. This conclusion necessarily results from other parts of the case. It is true, from the very constitution of a partnership, a presumption arises, that each partner is an authorised agent for the rest, in contracts relating to the subject matter of the partnership. But this relationship does not deprive either party of the liberty of making contracts for himself in similar matters. Thus, if A. and B. constitute a firm to merchandise goods, either of them, unless it is forbidden in the articles, is at liberty to enter into the same business at the same place on his own account. In this case, the first declaration of Lee is, that he had purchased the mule, without more. The legal presumption is, that when a person purchases a thing, he purchases it for himself. In such case, the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use.—*Swann* v. *Heald*, 7 East. 209. Now, as before stated, from the case it appears, that Lee did not, at the time of the contract, mention the name of the defendant. The entire obligation of the contract, as far as this question is concerned, rested upon him. Shall he be permitted, by his own declaration, to throw upon the defendant a

burthen, which was originally his alone? In other words, has he not a direct interest in lessening his own responsibility? If so, the presumption, upon which the rule rests, as to the admission of the declaration of one parner to bind another, is taken away. This does not conflict with the principle, that each partner may by his act and declaration bind his copartner, in all transactions relative to the subject matter of the copartnership, but extends only to the evidence required to show that responsibility.

It is believed, the declarations of Lee were not competent evidence to prove the fact, for which they were offered.

PER CURIAM. Judgment affirmed.

ELIZABETH HENRY *vs.* WILLIAM J. WILSON.

Where A. was entitled to a life estate in slaves, and, being threatened with a suit in Equity to enjoin her from sending the negroes out of the State, in consideration that the suit should be forborne, agreed that the slaves should be placed in the possession of B., who was to pay her the hires annually and they were accordingly so placed in B.'s possession. *Held*, that A. thereby transferred all her legal interest to B., there being a sufficient consideration and an actual delivery of the slaves—that A. therefore could not support an action at law for them, but her only remedy, if B. failed to pay over the hires, was in Equity.

Appeal from the Superior Court of Law of Gaston County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

Alexander, *Landers* and *Avery*, for the plaintiff.
Thompson, for the defendant.

Pearson, J. This was detinue, for negro Amy and her two children, decided upon a case agreed, viz: Sarah McIntire in 1815 bequeathed the negro Amy to the plaintiff in these words, "I give to my niece, Elizabeth Henry, the services of my servant Amy, during her life, the said Amy to be liberated at her death, according to the laws of the State, provided the said Amy is well treated, but, if it can be made to appear, that she is not well treated, I allow my executor to take her and liberate her, or put her in the hands of some person, who will treat her well;" and in a subsequent clause of the will are these words, "I do hereby authorise and empower my executor to be the sole judge of the treatment, that the said Amy may receive in the possession of the said Elizabeth Henry." One Lot Cannon was appointed executor, was qualified and assented to the legacy, and put the negro in the possession of the plaintiff, who retained the possession of her and her children until 1843, when the said Cannon was about to file a bill in equity against the plaintiff, upon the ground that she intended to remove the negroes out of the State. Whereupon, to prevent litigation, the parties agreed to constitute the defendant their mutual agent and to put the negroes into his possession, with the understanding, that he would hold them during the life of the plaintiff and hire them out annually during that period, and pay the proceeds of their hire to the plaintiff, and, at her death, deliver them to the said Lot Cannon. Accordingly the negroes were put into the possession of the defendant, and he for several years hired them out and paid the money to the plaintiff. In 1845, the plaintiff demanded the negroes and commenced this action. His Honor in the Court below was of opinion with the

plaintiff, and judgment was entered in her favor, from which the defendant appealed.

We do not concur in this opinion. It admits of much question, whether the plaintiff took a legal estate in the negro, and there is room to contend, that the whole legal estate continued in the executor, being necessary to enable him to execute the trust, in the event that the negro was not well treated; so that the plaintiff was only entitled to a trust or right to the services. But suppose the plaintiff took the legal estate for her life, leaving the reversion in the executor, we are of opinion, that she cannot maintain this action; because she parted with her title and it became vested in the defendant, in trust for her, so far as relates to the hires, during her life time, and then to be delivered to the executor, by force of the arrangement entered into between the executor and herself in the year 1843; the legal effect of which was, that, for a valuable consideration and forbearance to sue, she passed her estate to the defendant, in trust to pay her the annual hires; and this transfer, although without writing, was valid, as an executed contract, being a sale accompanied by an actual delivery. Thence she had no right to resume the possession, and has, in fact, no property in the slaves: her remedy, if the negroes are not annually hired out and the money paid to her, is by bill in Equity, to enforce the performance of the trust.

The judgment below must be reversed and a judgment entered for the defendant.

Per Curiam. The judgment reversed and judgment for the defendant.

[DEN ON DEMISE OF ISAAC LYERLY *vs.* CLAUDIUS B. WHEELER.

Where the lessor of the plaintiff in ejectment claims as purchaser at an execution sale, made under a judgment in which he was himself the plaintiff, he must show the judgment as well as the execution—and if the sale was by execution under a decree in Equity, he must not only show the decree, but also the bill and answer and so much of the pleadings and orders, as will shew, that the decree was pronounced in a cause properly constituted between the parties.

In an ejectment brought by a purchaser at a sheriff's sale against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground that he, the defendant, has a better title.

The cases of *Rutherford* v. *Raburn*, 10 Ire. 148, *Williamson* v. *Bedford*, 10 Ire. 198, *Thompson* v. *Hodges*, 3 Mur. 546, and *Isley* v. *Stewart*, 4 Dev. and Bat. 160, cited and approved.

Appeal from the Superior Court of Law of Rowan County, at the Spring Term 1850, his Honor Judge DICK presiding.

Craig, Osborne and Alexander, for the plaintiff.
Boyden, for the defendant.

NASH, J. Two questions are presented by this case to the consideration of the Court. The plaintiff claims title under a sheriff's deed, and, to establish it, offered in evidence a copy of a decree in Equity made in the Supreme Court in his favor against the defendant. The introduction of this evidence was opposed by the defendant, for the reason that copies of the bill and answer, filed in the case, ought also to be in evidence. The Court admitted the evidence. In this, we think, there was error.

The opinion of the Court below was endeavored to be sustained here, upon the act of 1848, ch. 53, passed, as it declares "to secure the title of purchasers of land sold under execution." It provides, that, "when lands had been sold or might be hereafter sold, by virtue of any writ of execution, &c., no variance between the execution and the judgment, whereon it issued, &c., shall invalidate the title of the purchaser." In the case of *Rutherford & Raburn*, 10 Ired. 148, the Court decided, that the effect of that act is to restore the common law on that subject.—By the common law, the execution not only justified the sheriff in acting under it, but the purchaser at the sale, in an action against the defendant in the execution, or one coming in under him after the lien attached, need not show the judgment. A contrary rule was established in this state by the case of *Hamilton & Adams*, 2 Mur. 161, and was considered the law until the passage of the act above mentioned. In *Raburn & Rutherford*, however, the court restrained the operation of the act to cases, where the purchaser is not the plaintiff in the execution. When he is, he must show a judgment, not to show that there is no variance between it and the execution, but that the plaintiff had a just claim against the defendant and it had been ascertained by a judgment—and to this, the case of *Lake* v. *Billers*, 1st Lord RAYMOND, is cited.—If it was necessary, then, for the plaintiff to produce a copy of the decree in Equity, which we hold to be the law in such a case, the copy of the decree alone will not answer. To make it evidence, it was necessary for him to have the bill and answer and so much of the pleadings and orders, as would show, that the decree was pronounced in a cause properly constituted between the parties. *Williamson* v. *Bedford*, 10th Ire. 108. Another question was presented by the case, the decision of which is not necessary to the disposition of the case at present, yet, as it must be presented to another jury, and

may again arise, to save time and trouble, we proceed to give our opinion upon it. The defendant offered to prove, that, before the decree offered in evidence was obtained, he conveyed the land in dispute to one Locke in trust to secure his endorsers to a bank debt, which he owed, and that the said trustee on the 23d of November 1846, had sold the premises at auction to one Nathan Chaffin, to whom he made a conveyance and who leased the land to him and under whom he now held it. This evidence was rejected by the court. In an ejectment brought by a purchaser at a sheriff's sale, against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground, that he, the defendant, has a better title.

The action of ejectment is to recover possession, and whatever possession the defendant in the execution had, the purchaser acquires by the sale and is entitled to recover. *Thompson* v. *Hodges*, 3 Mur. 546. *Islay* v. *Stewart*, 4 Dev. & Bat. 160. Our attention in the argument was called to *Marsh's case* in 9th Ir. This opinion is not in conflict with it. It was decided on its own peculiar features. The land had been sold under executions against the defendant for different persons, to one of whom he was considered as having surrendered the possession and he took a new lease, after the last sale by the sheriff.

Per Curiam. Judgment reversed and *venire de novo*.

JACOB BLEVINS vs. WILLIAM BAKER & AL.

An officer, who has an execution against a tenant in common of chattels, may levy upon the undivided property and take it into his possession, for the purpose of selling the interest of the defendant in the execution; and he does not thereby subject himself to an action by the other tenant in common.

The cases of *Tredwell* v. *Rascoe*, 3 Dev. 50, *Wells* v. *Mitchell*, 1 Ire. 484, and *Isley* v. *Stewart*, 4 Dev. & Bat. 160, cited and approved.

Appeal from the Superior Court of Law of Ashe County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

Craig, for the plaintiff.
Boyden, for the defendants.

PEARSON, J. This was trover for 45 bushels of salt, a wagon and five horses, and a tent cloth, 5 pair of wagon gear, an axe, bucket, one coat and log chain. The plaintiff and one Peppers were tenants in common of the salt, which they had in a wagon. The wagon was stopped at the store of the defendant, Baker, the hind gate taken off and several sacks of salt delivered to Baker. At this time the defendant, Hunt, who, as constable, held several executions against Peppers in favor of Baker, was in the act of seising and levying on the 45 bushels of salt. The plaintiff and Peppers attempted to prevent his doing so, by putting on the gate of the wagon and starting the horses; whereupon Hunt caught hold of the horses and

kept them from moving, and, after much altercation, the plaintiff and Peppers went off and left the salt, wagon, horses and every thing appertaining thereto. The defendants took out the salt and put it in Baker's store house, and weighed off one half, as the share of Peppers, which Hunt afterwards sold under his executions. The wagon belonged to Baker, he having hired it to the plaintiff to make the trip to the salt works; the horses belonged to persons in the neighborhood, who had hired them to the plaintiff. Baker kept his wagon, took the gear off the horses and turned them loose and they went to their respective owners. The tent cloth, gear, axe, bucket, coat, &c., belonged to the plaintiff. These articles the defendants did not remove or use or claim in any way. They remained where the plaintiff had left them; he could, without opposition, have taken them away at any time. It was not alleged, that the plaintiff wished or offered to resume the use of the wagon and horses after the salt had been taken out.

The Court charged "that the defendants had no right to take possession, at all, of the salt, in the way they had done, by virtue of a levy on Peppers' interest and the plaintiff had a right to sustain this action for such taking." On the second point, the Court charged "that the plaintiff, having a general right to and possession of the tent cloth and gear and other articles and a special right to and possession of the wagon and horses, had a right to recover, in this action, the actual damages which he had suffered by the interference of the defendants."

To this the defendants except. There was judgment for the plaintiff and an appeal.

We think, there is error in the charge upon both of the questions made. The interest of a partner in partnership effects may be sold under a *fi. fa.* for his individual debt. *Treadwell* v. *Rascoe*, 3 Dev. 50. The sheriff must of necessity seise, and take into his possession, the effects

levied on, in order to make the sale, and the other partner cannot maintain an action of any kind either against the officer, who levies and sells, or against the purchaser who takes possession. Indeed, it is held, that a partner cannot maintain an action of any kind against one, who purchases copartnership effects from a copartner, though such sale was made in fraud of the rights of the partnership and to satisfy the individual debts of such copartner. *Wells* v. *Mitchell*, 1 Ire. 484. Such being the law, in the case of partners, between whom the relation is more intimate, a *fortiori*, it is so in reference to mere tenants in common. The legal interest of a defendant in undivided chattels may be seised and sold under execution, *Islay* v. *Stewart*, 4 Dev. & Bat. 160, and the Court treat the question as too plain to call for authority. We know of "no principle which forbids a seisure and sale of a defendant's legal interest in undivided chattels." The officer must, of necessity, take possession of the whole, as it is undivided, and sell the right of the defendant in his execution, in the whole, and the purchaser becomes a tenant in common with the other part owner, and they must arrange the matter between themselves, as neither can maintain trespass, detinue or trover, unless the property is destroyed, (or as some say) sold.

Upon the second point, the construction ought to have been, that the evidence, if true, did not prove a conversion, either as to the tent cloth, gear and other articles, or of the wagon and horses. The defendant Hunt seised the horses, as a means necessary to enable him to complete his levy upon the salt After he had seised the salt, the plaintiff might, without opposition, have taken the tent cloth, and every thing to which he was entitled, if he had chosen to do so.

An officer may justify an entry upon the land of a third person, if necessary to enable him to levy on the property of the defendant in the execution. So it would seem, if

this action had been trespass for seizing the horses, the officer might have justified the act, as necessary to enable him to make the levy.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHNSON LEDBETTER vs. THOMAS J. TORNEY & AL.

A surety, who has paid money for his principal, cannot sue him in an action of *tort*.

The case of *Williamson* v. *Dickens*, 5th Ire. 259, cited and approved.

Appeal from the Superior Court of Law of McDowell County, at the Spring Term 1850, His Honor Judge CALDWELL presiding.

This is a suit in *tort*, to recover from the defendants a certain sum of money, paid by the plaintiff to their use. The defendants, among other pleas, pleaded severally their certificate and discharge under the bankrupt law. On the trial it appeared, that the plaintiff became the surety of the defendants to one Logan for $2100; that, on the defendants becoming insolvent, he was forced to pay the said debt with costs, and, thereupon, instituted this suit. The Court was of opinion, that the plaintiff could not elect to sue in *tort* in this case; and, in deference to this opinion, the plaintiff submitted to a non-suit and appealed.

J. Baxter, for the plaintiff.

J. G. Bynum, Avery and N. W. Woodfin, for the defendant.

PEARSON, J. The only question is, whether a surety, who has paid money for his principal, can declare in *tort*; so as to escape from the plea of a certificate in bankruptcy. The plaintiff's counsel was not able to show any authority in support of his position, and it cannot be supported upon any fair reasoning upon the nature of the cause of action. In fact, if a surety is allowed his election to declare in *tort* or in contract, the landmarks, by which actions are distinguished, will be entirely obliterated; and the marked difference, between actions *ex contractu* and actions *ex delicto*, will be lost sight of.

In *Williamson* v. *Dickens*, 5 Ire. 259, it is held, that, when a creditor has a claim, which he may enforce, either by an action of assumpsit or in *tort*, if he sues in *tort*, his action is not barred by a discharge in bankruptcy, and when an agent has failed to collect, or has collected and misapplied the funds, the principal may declare in contract or in *tort* at his election. So if a carrier or other bailee fails in the diligence required, he may be sued in contract or in *tort*.

Without undertaking to run out the dividing line between those cases, in which the plaintiff must declare in contract and those when he has his election to declare in contract or in *tort*, and to reconcile the cases, it is sufficient for us to say, that there is no authority nor reason for allowing the plaintiff in this case to declare in *tort*.

PER CURIAM. Judgment affirmed.

LEONARD SHOWN'S EXR'S. vs. JOSEPH BARR & AL.

That the plaintiff, who sues as executor, is not an executor, is a plea in bar, and the defendant may plead it with any other bar.

The certificate of a presiding magistrate of a court of record in another State, which merely sets forth that A. B., who attests the transcript, was the clerk of that court, but does not declare that "his attestation is in due form of law," not being according to the Act of Congress, cannot be received in evidence.

Appeal from the Superior Court of Law of Ashe County, at the Spring Term 1850, his Honor Judge DICK presiding.

The plaintiffs declare, as the executors of Leonard Shown deceased, on a bond to their testator; and the pleas are *non est factum* and *ne ungues executor*. After proving the bond, the counsel for the plaintiffs insisted, that they were thereon entitled to a verdict, forasmuch as the plea of *non est factum* overruled the other plea.—But the Court held otherwise. Then, in support of the issue on the latter plea on their part, the plaintiffs offered in evidence a transcript of the proceedings in the County Court of Johnson County in Tennessee, prior to this suit, purporting to be an order of the Court, that letters testamentary issue to the plaintiffs, "who were appointed executors in Leonard Shown's will," and to state, that the plaintiffs took the oath, prescribed by law for executors. To it was annexed an attestation by Alfred T. Wilson, as clerk of the Court, under his hand and seal of the Court, and dated July 13th 1847, setting forth,

"that the foregoing is a true transcript of the records of the said County Court at August Term 1845." There was also annexed a certificate of "James King, chairman, &c.," made July 13th 1848, "that the within is a true copy of the record of this Court at August Term 1845 and that it is taken in due form of law, and that Alfred T. Wilson was then acting clerk of the Court, duly elected, and that the seal annexed is the seal of this Court." Upon objection on the part of the defendants, that the transcript was not duly certified, the Court rejected it; and the plaintiffs submitted to a non-suit and appealed.

Craig, for the plaintiffs.

Thompson and McCorkle, for the defendants.

RUFFIN, C. J. The Court considers the decision on both points to be correct. That the plaintiff is not executor or administrator is a plea in bar. 3 Chit. Pl. 942. *Stokes* v. *Bate*, 5 B. & C. 491. Consequently, under the statute, the defendant was entitled to plead it with any other bar. Without noticing any objection to the judicial proceedings in Tennessee, as constituting letters testamentary, had the transcript been received in evidence, it is sufficient to say, that the objection, made at the trial, to its reception, is decisive. The Act of Congress requires, that the presiding magistrate of the Court shall certify, that the person, who attests the transcript, is the clerk of the Court, and that "the attestation is in due form;" instead of which, the certificate here is, that Wilson was then, in August 1845, clerk—and it is utterly silent as to the attestation. As the transcript was not proved in any other manner, nor authenticated in conformity to the Act of Congress, it was properly rejected; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

ISRAEL RICE *vs.* JAMES CARTER'S ADM'R.

A. sold a tract of land to B. and gave him a bond for the title, and B., as the price of the land, promised verbally to pay one hundred dollars to C. to whom A. was indebted. *Held*, that this case does not fall under the 10th section of the statute of frauds, Rev. Stat. ch. 50, sec. 10 and 8, relating to promises to pay the debts of other persons, because the promise is to pay the debt of the very person, to whom the promise is made.

But in such a case the promise being verbal, comes within that provision of the 8th section, which provides that all contracts to sell or convey lands, &c. shall be void, unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith &c. Under this part of the section, the verbal promise was void.

The cases of *Miller* v. *Irvin*, 1 Dev. & Bat. 103, *Choate* v. *Wright*, 2 Dev. 289, *Carter* v. *Graves*, 2 Hawks 576, and *Smith* v. *Lewis*, 3 Hawks 469, cited and approved.

Appeal from the Superior Court of Law of Yancy County, at a Special Term in July 1850, his Honor Judge BATTLE presiding.

J. W. Woodfin, for the plaintiff.

Gaither, with whom was *N. W. Woodfin*, for the defendant, submitted the following authorities:

Miller v. *Irvin*, Dev. & Bat. 1 vol. 103, and the references. *Wain* v. *Watters*, 5 East. 10, published in Smith's leading cases and the notes, 2 vol. 188.

PEARSON, J. This was assumpsit, upon a promise to pay one hundred dollars as the price of a tract of land. The plaintiff proved, that he sold to the defendant a tract of land, and executed to him a bond for title, to be made

when the purchase money was paid; whereupon, as the price of the land, the defendant promised to pay one hundred dollars to certain persons, to whom the plaintiff was indebted. The defendant relied on the statute of frauds —Rev. Stat. ch. 50, sec. 10 and 8. The 10th section provides, that "no action shall be brought to charge the defendant upon any special promise to answer the debt, default or miscarriage of another person, unless the agreement or some memorandum or note thereof be in writing."

The case does not fall under the operation of this section, for the promise is to pay the debt, not of another person, but of the *very person* to whom the promise is made, and it is well settled, that such a promise does not fall within the operation of this section of the statute.

The 8th section provides, that all contracts to sell or convey lands and slaves shall be void, unless such contract or some memorandum or note thereof be put in writing, and signed by the party to be charged therewith, &c. The contract, in this case, was for the sale of land. The defendant signed no memorandum or note in writing, whereby he can be charged; and we are at a loss to see any ground, at all plausible, to support an action against him upon a mere verbal promise. *Laythroop v. Bryant*, 2 Bing. N. C. 744. The defendant had signed a written contract to convey land. The plaintiff (like the defendant in this case) had only made a verbal promise to pay the price, and it was urged for the defendant, that he ought not to be held liable under his written promise, inasmuch as the plaintiff was not bound by his verbal promise; but, said the Chief Justice, "whose fault was that? The defendant might have required the plaintiff's signature. The object of the statute was, to secure the defendant. In the argument, a little confusion has grown out of the fact of not distinguishing between the consideration of an agreement and the mutuality of claim. The defendant, for a sufficient con-

sideration, has bound himself in writing; whether the plaintiff is bound or not is not now the subject of enquiry." In this case, the construction of the statute was fully discussed. It is taken for granted, and as a thing not debatable, that the party, *who did not sign* the memorandum or note in writing, was not liable, and the idea of his being liable is not even suggested. In *Miller* v. *Irvin*, 1 Dev. & Bat 103, it is held that the act of 1819, to make void parol contracts for the sale of land and slaves, does not require the consideration to be set forth in the writing. This is a departure from the English law, but we cannot see, that it has the least bearing upon the present question. So, in *Choate* v. *Wright*, 2 Dev. 289, and many cases following that decision, it is held, that this statute does not apply to executed contracts. We concur with these cases, but they have no bearing upon the present question. The contract here was not executed on either side and was purely executory. *Carter* v. *Graves*, 2 Haw. 576, *Smith* v. *Lewis*, 3 Hawk 469, and several other cases for the price of land, where deeds had been executed, in which the payment of the purchase money was recited and a release given, all turned upon the question of estoppel, and the point is not made, whether the vendee was bound for the price without a promise in writing, because those were cases of executed contracts.— The contract in the case now under consideration is *executory*, and comes within the words, as well as the meaning, of the statute, which was intended to prevent fraud and perjury, in relation to contracts for the sale of land and slaves.

Per Curiam Judgment reversed and *venire de novo*.

ROBERT POSTON vs. ROBERT HENRY.

A recovery in ejectment will not support an action for the *mesne* profits, unless the lessor has regained the possession, either by being put in under process, or by being let in.

Where a recovery in ejectment is upon the demise of one of several lessors, putting another lessor in possession does not entitle the lessor, upon whose demise the recovery was effected, to an action for the *mesne* profits.

Appeal from the Superior Court of Law of Buncombe County, at the Special Term in July 1850, his Honor Judge BATTLE presiding.

The action is trespass for *mesne* profits. Plea, not guilty. On the trial the plaintiff gave in evidence the record of a recovery in ejectment. The declaration contained three counts, upon the several demises of George W. Jones, Rebecca Poston, and the present plaintiff, Robert Poston. It was served upon Evans, as the tenant in possession; but, upon the affidavit of one Deaver and a motion in the name of the present defendant, he, Henry, was admitted a defendant and pleaded to the action. At the trial, the issue, on the demise of Robert Poston only, was submitted to the jury, and on it there was a verdict for the plaintiff, and judgment was entered thereon in July 1848. In August 1848, an *habere facias possessionem* issued, which recited the recovery of the premises by John Doe on the demise of Robert Poston, and commanded the sheriff to put the said party, plaintiff, or his agent, into sole possession, &c. Under it the sheriff put in George W. Jones in August 1848, and this suit was brought about a month afterwards. Upon those facts, the counsel for the defendant took several exceptions;

and among them was one, that the plaintiff could not maintain this action, because it did not appear that he had entered, after the recovery in ejectment. It was overruled, and the plaintiff had a verdict and judgment, and the defendant appealed.

N. W. Woodfin, for the plaintiff.

J. Barter, *Henry* and *Gaither*, for the defendant.

Ruffin, C. J. The Court thinks the objection good.—A recovery in ejectment will not support an action for *mesne* profits; for it is trespass for an injury to the possession, and, therefore, it is necessary the plaintiff should show, that he had regained the possession, either by being put in upon process, or let in. In this case, that is not shown. We cannot conjecture, why the ejectment was tried as it was. But so it is, that the verdict and judgment are on the count on Robert Poston's demise, and the writ of possession accords with them. In fact, however, Robert Poston has never been in under those proceedings; and, without further evidence of the connection between that person and Jones, the Court cannot presume that Jones was the agent of Poston to receive the possession. It is true, they were both lessors of the plaintiff in ejectment. But that was by separate demises of the whole and imports several titles; so that it cannot be seen, that the possession of one of them is that of the other, and consequently the present action cannot be maintained, and it becomes unnecessary to consider the other points made.

Per Curiam. Judgment reversed and *venire de novo*.

W. W. DAVIS ex. WILLIAM T. COLEMAN & AL.

When A., a citizen of Georgia, being in this State, offered to lend to B. six thousand dollars, but on his return to Georgia, not having sold his cotton crop, wrote to B. that he could only lend three thousand dollars, whereupon B. went to Georgia, there received the money and executed his note for that amount. *Held*, that B. was bound to pay eight per cent., the interest according to the laws of Georgia.

Appeal from the Superior Court of Law of Rutherford County, at the Fall Term 1849, his Honor Judge ELLIS presiding.

J. Baxter and Bynum, for the plaintiff.
Gaither and Avery, for the defendants.

PEARSON, J. This was debt upon a promissory note — The defendants relied upon the plea of usury. It was proven, that the plaintiff, who is a citizen of Georgia and has been in the habit, for many years, of spending his summers in this State at the springs, offered to lend one of the defendants six thousand dollars, the interest to be paid annually and satisfactory security to be given. This offer was made in Asheville. Afterwards the plaintiff, having returned to Georgia, wrote a letter to the defendant, William T. Coleman, informing him that he had not sold his cotton crop, as he had expected to have done, but would be able to accommodate him with three thousand dollars. Whereupon the defendant, Coleman, procured a note to be signed by himself and the other defendants, carried it to Augusta, Geogia, then filled it up, de-

livered it to the plaintiff, and received from him three thousand dollars. Eight per cent. is the legal rate of interest in the State of Georgia.

The only question was, whether the contract was made in this State or in the State of Georgia, there being a difference in the rate of interest. The jury, under the instructions of the Court, returned a verdict for the plaintiff, with eight per cent. interest, and from the judgment thereon, the defendant appealed.

We think it clear, that the contract was made and carried into effect in the State of Georgia, and must be governed by the law of that State. The chaffering or talk about the loan of money, which took place in this State, did not amount to a contract. If the plaintiff had refused to lend the money, the defendants would have had no cause of action against him; nor would the plaintiff have had a cause of action against them, for failing to apply for the money. So, in fact, there was no definite contract made in this State, but a mere preliminary arrangement, having no force nor effect in legal contemplation, until consummated by the delivery of the note and the receipt of the money, all of which took place in the State of Georgia. We, therefore, concur in the opinion of his Honor, that the contract cannot be avoided upon the plea of usury, inasmuch, as, although first spoken of and mentioned in this State, it was not, in fact, consummated, until the parties met in the State of Georgia; and there was no evidence of any collusion or corrupt agreement to evade the law of this State.

PER CURIAM. Judgment affirmed.

MERCER FAIN vs. A. S. EDWARDS & AL.

Where a witness for the plaintiff, on being examined as to a particular transaction, stated that he had paid a certain sum of money to the plaintiff, and the witness' credit was attacked and the transaction impeached for fraud, *Held*, that it was competent for the plaintiff to shew that he had entered the payment on his books at the time alleged.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

J. Baxter, for the plaintiff.
J. W. Woodfin, for the defendant.

NASH, J. The only question, presented for the consideration of this Court, is as to the admissibility of testimony. The case shews that the defendant, Holcombe, had a judgment and execution against one Loudermilk. The execution was levied on the horse in question, claimed by the plaintiff and sold by the defendant. To prove his title, the plaintiff called Loudermilk, as a witness, who stated that he had sold or swapped another horse, belonging to the plaintiff, for the one in question. The difference in value between the two animals was thirty dollars, which he paid to the owner of the other horse, and the plaintiff gave him a credit on his book for that amount. The plaintiff was a merchant. The transaction between the plaintiff and witness was impeached on the ground of fraud. To corroborate the testimony of

Loudermilk, the plaintiff offered his book to prove, that he had entered the credit, as deposed to. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

We think the Court below erred in rejecting the evidence. As a general rule, it is admitted that a man cannot manufacture evidence for himself; but the evidence offered here does not touch upon it. For if the entry was made at the time it is alleged to have been, it was against the interest of the plaintiff, as it was an acknowledgment either of a subsisting debt due to Loudermilk or of a discharge from it. The fact, offered to be proved by the plaintiff, was not offered in chief, but in reply, to support the witness, whose veracity was impeached by the opposing party, and to rebut the imputation of fraud and want of a consideration, by shewing that the credit was entered as he had stated. The effect of the evidence, if admitted, was another question, for another tribunal. If, instead of entering the credit on his book, the plaintiff had given the witness a receipt for it, or a note promising to pay it—would it not have been competent for him to sustain the credit of the witness, by shewing the one or the other? We think, unquestionably it would. If so, why is not the entry in the book evidence? We can see no difference in principle in these cases and the one under consideration, except that, in the present case, the evidence of the fact was in the custody of the plaintiff; in the others, in that of the witness. In deciding this question, we are bound to presume, that the plaintiff was prepared to prove every thing, necessary to make the book evidence. Our attention is called to the single question, as to the admissibility of the entry, for the purpose for which it was tendered. We think his Honor erred in rejecting it. Evidence, which is not proper in chief, may become so in reply. Until a witness' testimony is impeached, the party producing him cannot shew, that he

has stated the same facts at a previous time. So neither in the case of a person, who is prosecuted for larceny, can the State show that he is a man of bad character, until he has laid a foundation for the evidence, by attempting to show his good character.

Per Curiam. Judgment reversed and *venire de novo*.

HARVY D. CARRIER vs. ADAM HAMPTON.

Where the subscribing witness to a deed for land or slaves and the maker are dead, or cannot be procured, whereby it cannot be acknowledged by the one nor proved by the other, recourse may be had to the common law mode of proof, for the purpose of registration, as for the purpose of making the deed evidence at common law generally.

In such a case the party would be under the necessity of giving similar evidence of the execution on the trial.

A mere mark or cross of an illiterate subscribing witness, *prima facie*, cannot be identified, and therefore the instrument may be read upon proof of the hand-writing of the party.

Where from the certificate of the probate of a deed, it only appeared that the witness swore, in general terms, that the signature of the party was in his hand-writing, but he did not state upon what grounds he formed his opinion, nor by what means he had acquired a knowledge of the hand-writing of the party, *Held*, that this evidence gave no authority to grant an order of probate.

Where the plea of fully administered is found in favor of the administrator, and, upon a *scire facias* against the heirs, they come in and plead that the administrator has assets, *Held*, that upon the trial of the issue upon that plea, the heirs may give evidence of any assets received by the administrator, either before or after the trial of the original suit, and up to the time of the plea pleaded to the *scire facias*.

The cases of *Cutler* v. *Spiller*, 2 Hay. 61; *Rhodes* v. *Holmes*, 2 Hawks. 193; *Hooton* v. *Hagley*, 1 Hawks. 48; *McKinder* v. *Littlejohn*, 1 Ire. 69; *Jones* v. *Blount*, 1 Hay. 238; *Pope* v. *Askew*, 1 Ire. 17; *Miller* v. *Spencer*, 2 Mur. 281, and *Martin* v. *Harding*, 3 Ire. Eq. 603, cited and approved.

Appeal from the Superior Court of Law of McDowell County, at the Fall Term 1849, his Honor Judge Ellis presiding.

This action was commenced in October 1843, and is trover for slaves, which the defendant claims under a bill of sale from his father, Jonathan Hampton, the intestate of the plaintiff. On the trial of not guilty pleaded, the plaintiff produced, as witnesses, two other sons of the intestate, who executed to the plaintiff releases for their respective distributive shares of the personal estate and effects of their deceased father, and to whom, also, the plaintiff executed several releases for any claim for the costs of suit. The defendant still objected to their competency, upon the following grounds, which they stated on their *voire dire*. Certain creditors of the intestate instituted actions against the plaintiff, for debts of the intestate, in which he pleaded "fully administered" and no assets, which were found for him: and the creditors took verdicts, ascertaining their demands and signed judgments therefor, according to the statute, and then issued writs of *fieri facias* against the witnesses and the other heirs, to have execution against the real estate, in which the heirs had not yet pleaded, but the same were still pending. Upon the death of their father, lands descended from him to the witnesses, and, after the expiration of two years from his death, the witnesses respectively sold and conveyed their shares: the one, without, and the other with, general warranty. The Court was of opinion, that upon the collateral issue, which the witnesses might have, the questions of fully administered and no assets extended only to the truth of the administrator's plea, when the same was pleaded, and therefore, that the interests of the witnesses could not be affected by the result of this suit, and they were received and permitted to give evidence, that the intestate had the slaves in his possession and used and claimed them as his own up to

his death, which occurred several years after the date of the alleged bill of sale to the defendant, and, also, that, during that period, the defendant did not claim them.

The defendant then produced his bill of sale, which purported to be attested by one Edmund Tomberlin, as the subscribing witness, who did not write his name, but made his mark in the form of a cross, in the manner usual with illiterate persons: and, having proved that the said Tomberlin was dead, the defendant moved to give the deed in evidence upon the probate and registration thereof. The probate was before a judge of the Superior Court on the 6th of July 1846; and he certified, "that Jefferson S. Hampton, being duly sworn, testified that Edmund Tomberlin, the subscribing witness to the within written bill of sale, is dead, and that the signature of Jonathan Hampton, the grantor therein, is in the proper hand writing of the said grantor;" and, thereon, it was ordered to be registered: upon objection by the plaintiff, the Court refused to admit the instrument in evidence.—After a verdict and judgment for the plaintiff, the defendant appealed.

J. G. Bynum and N. W. Woodfin, for the plaintiff.

Avery, G. W. Baxter and J. Baxter, for the defendant.

Ruffin, C. J. The deed to the defendant was, the Court thinks, properly excluded. As creditors and purchasers are not parties to the controversy, but only those who are party and privy to the instrument, the old cases would have allowed it to be proved on the trial, as a conveyance at common law and read, without reference to its attestation, probate and registration, under the acts of 1784, 1789 and 1792. *Cutlar* v. *Spiller*, 2 Hay. 61.—*Rhodes* v. *Holmes*, 2 Hawks. 193. But the Court does not further consider that point, as it was not raised on the trial, and the defendant insisted, on the contrary, that

he was entitled, under the statute, to read the deed on the probate and registration appearing on it, without further proof of its execution. Rev. Stat. ch. 37, sec. 21. But that depends upon the question, whether there has been that due probate and registration, which the act meant, and the Court is of opinion, there has not. The case that occurred is not expressly provided for in the act.— But there is no hesitation in holding, that a deed for land and slaves would not be avoided by the accidental circumstance of the death of the subscribing witness and of the maker, whereby it could not be registered upon proof by the one or acknowledgment by the other. In such a case, we hold that recourse may be had to the common law mode of proof for the purpose of registration, as for the purpose of making the deed evidence at common law generally. But it would follow, that, in such cases, the party would be under the necessity of giving similar evidence of the execution on the trial, since it is clear, that the provision of the act, which dispenses with the subscribing witness upon the trial, and admits the deed on its probate and registration, supposes the probate and registration, thus received, to have been upon the evidence of that witness or the acknowledgement of the party or in some other way specified by the statute. In the present case no such proof was offered on the trial: nor, in the opinion of the Court, was proper and sufficient evidence given, to authorize the order for registration. The case of *Horton* v. *Hagley*, 1 Hawks, 48, shows that point to be open, when the instrument is offered to support a title and the defect of the evidence appears in the probate itself. The Court does not concur in one of the objections taken to the probate by the counsel for the plaintiff, that there ought to have been proof of the mark being in the hand of the witness, or at the least, affirmative evidence, that the defendant endeavored and failed to get proof to the mark, as being that of the witness.—

For, although in some very extraordinary instances, the mark of an illiterate person may become so well known, as to be susceptible of proof, like hand-writing, yet, generally, a mark, a mere cross, cannot be identified, and, therefore, *prima facie*, it stands *per se* upon the same reason with the case, in which the party, after due enquiry, has been unable to prove the signature of the person, who, upon the face of the instrument appears to have written his name as subscribing witness—in which case, the instrument may be read upon proof of the hand-writing of the party. *McKinder* v. *Littlejohn*, 1st Ire. 66.—*Jones* v. *Blount*, 1st Hay. 238. But the other objection, that the proof of the grantor's hand writing was defective, and, so, did not authorize the order for registration, the Court deems well founded. The witness deposed in general terms, that the signature of Jonathan Hampton was in the hand-writing of that person; but he did not state, upon what grounds he formed his opinion, nor by what means he had acquired a knowledge of the hand-writing of the party; and consequently it does not appear that his means of information were such, as to render his opinion admissible. *Pope* v. *Askew*, 1 Ire. 17. *Jackson* v. *Waldron*, 13 Wend. 178. Upon the other point, as to the competency of the sons of the intestate, the opinion of the Court differs from that of his Honor.—It is true, the creditor, who sued the administrator, could not, in any proceeding of his own, directly against the administrator, either in law or in equity, reach personal assets subsequently received by the administrator. *Miller* v. *Spencer*, 2 Mur. 281. *Martin* v. *Harding*, 3 Ire. Eq. 603. But that arises from the forms of the pleadings and judgment, and the conclusiveness, belonging to the adjudication of all tribunals, upon matters within their jurisdiction, when the same matters come up a second time between the same parties. But the same operation is not given to a judgment against third persons generally; and

the statute enacts in the particular case of creditor, executor and heir, that execution may go against the estate of the heir upon a judgment in a suit against the executor, provided the executor has fully administered or hath not personal assets; and it enacts further, that at the election of the heir, a finding in the first suit of fully administered and want of assets shall not bind the heir nor even the creditor, and enables the heir, on the *scieri facias* of the creditor, to take a new issue upon the question of assets with the executor, who is kept in Court for that purpose. That is a collateral issue, and the creditor stands by, awaiting the result, for the sake of the right of the other parties, as between themselves; for the law supposes the creditor is to be paid, at all events, by the one side or the other, which ever has the estate of the debtor, that is then chargeable; and, to that end, if the issue be found against the executor, it gives the creditor execution *de bonis testatoris et de bonis propriis*. It is apparent, that, through the rights of the heir, the creditor may thus have satisfaction from the personal estate of the executor, when, of himself, he could not get at either. Although those provisions of the law, were, doubtless, designed chiefly, if not entirely, for the protection of the heir, yet, the creditor also derives, incidentally, a benefit from them. That benefit and protection are necessarily co-extensive; and as far as the heir can show assets in the hands of the executor, the creditor is turned over to him, and the land of the heir is, *pro tanto*, exonerated.—That was admitted in the argument to be true, in respect to such personal assets, as the heir may shew the executor to have been liable for, at the time the executor pleaded originally; making the issue between the heir and the executor relate back to that between the creditor and the executor. But, as the Court conceives, that limits the issue too straitly, and is opposed to both the words and the reason of the law. As the heir has no interest in the

question of assets, save only to protect his own inheritance, it is to be presumed from his tendering an issue, that he has real assets, and therefore, that the creditor will obtain satisfaction, at least, to some extent. If, then, the collateral issue relates to the executor's plea, the consequence would be, that the heir's land might be sold under the judgment, while the executor had ample assets, received, indeed, after he had pleaded or after judgment in the action against him. That, unquestionably, is contrary to the policy of the law, and, we think, the construction of the statute. The law does not mean the land of the heir to be taken upon judgment on a *scire facias*, if there be personal assets, with which the debt ought to be discharged, at the time payment is demanded of the heir; for, the very purpose is to save the land of the heir, and it ought to be done, if practicable, and without reference to the ability or inability of the executor to pay the debt at any previous period, provided he then have the means. If the heir and the next of kin or legatee, entitled to the personalty, be the same person, the law could never intend, that the executor, upon a technical rule of pleading, affecting him and the creditor, should be enabled to withhold the personal estate belonging to this person as next of kin and thereby deprive him of his inheritance. If, on the contrary, different persons fill those characters, it is manifestly unjust, that the property of one should be taken to pay the debt of the other; and, that, too, when it may be conveniently ascertained, in a pending proceeding, out of which property of the two, it ought to be paid. It is true, indeed, that this enquiry cannot be brought down to the day of trial, but, by the forms of judicial proceedings, is stopped by the tender of the issue by the heir. Up to that time, however, the purposes of the law require, that the heir shall be allowed to call the executor to account. Hence the statute is, not only that "the heir shall be at liberty to contest the truth of the finding of the issue in

favour of the executor," but he may thus contest its truth by a "plea, that the executor *hath* sufficient assets or *hath* wasted the same." It was, therefore, erroneous to suppose, that the issue is as to the truth of the administrator's plea, that he then had no assets. In reality, however, that distinction is not material to the question of the competency of the heir, as a witness, for his ancestor's administrator, in a suit for property alleged to belong to the intestate; for, unquestionably, the heir would be entitled to satisfaction out of the personalty, no matter when received, for money raised by legal process out of his land, although the creditor to whom the money was paid had lost his remedy against the executor. However it may be, between the creditor and the personal estate, that estate must certainly exonerate the real estate or reimburse to it all sums, which it was compelled to pay to creditors, and it is a common equity to give relief in such cases.—Therefore although the witness might not be able to charge the administrator upon a collateral issue with these slaves, as they have never been in his possession, and he has, hitherto, been unable to recover them, yet, if he should hereafter do so, they can insist on the return thereout of the money, raised out of their land or paid by them in respect of it, and, therefore, it is not competent to them to give evidence, that the property was in their ancestor. The releases, given by them, make no difference, as they give up only their distributive shares as next of kin, and their right, which we have been considering, is as heirs at law, and distinct from the other. Neither is their liability or recourse ever affected by their sales of the land; for, the statute makes them answerable for debts, as the land itself would have been, to the value of it, and without any regard to the sale being with or without warranty.

Per Curiam. Judgment reversed and *venire de novo*.

JOHN C. WATTERS & WIFE *vs.* GEORGE W. SMOOT.

Where a man has charged a woman with incontinence with a particular individual, he cannot, on the trial of an action for this slander, go into evidence to show that she was incontinent with other persons.

The declarations of the husband, who is necessarily a party to the suit for slander of his wife, are admissible in evidence to show her guilt.

The case of *Snow v. Witcher*, 9 Ire. 346, cited and approved.

Appeal from the Superior Court of Law of Wilkes County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

Boyden, for the plaintiffs.
H C. Jones, for the defendant.

PEARSON, J. This was case for slanderous words, spoken of the plaintiff, Mrs. Watters.

The words charged this plaintiff with criminal intercourse with one Nelson Haggins. In support of his plea of justification, the defendant offered no proof in reference to Haggins, but offered to prove that Mrs. Watters had had criminal intercourse with other men, and the plaintiff, her husband, had on several occasions said, she was guilty of such intercourse with men, other than Haggins. This testimony was objected to, but was received. There was a verdict for the defendant, and from the judgment thereon, the plaintiffs appealed.

The question is, where the words make a charge of incontinence with a particular individual, can the plea

of justification be supported by proof of criminal intercourse with other men? or must the defendant make good his plea, by proof of such intercourse with the individual named? A charge, that the plaintiff stole the hog of A., is not supported by proving that he stole the hog of B. When the charge is general, as that the plaintiff is guilty of larceny or of counterfeiting, the plea sets out some particular act of larceny or of counterfeiting, so as to make the issue certain; and, in this case, the defendant has the advantage of being able to put his defence upon any particular act of the kind, which he thinks he can prove. But when the charge is *particular*, and the defendant, at the time he speaks the words, selects a specified offence, he is bound by it, and his plea must rest on that particular matter. This is obviously right, because, having, for the sake of giving point and force to his charge, gone into particulars, and having had the advantage of thereby making his accusation the more plausible, he has no right to complain, that he is not allowed to make a departure, and run over the plaintiff's whole life, to see "if there be no shame in it." This is a well settled distinction in slander, and we see no reason to find fault with it.

The statute, which gives the present action, provides, that it shall be prosecuted "under the same rules and regulations, as have been heretofore observed in the trials of actions of slander"; and we are not at liberty, if we were so disposed, to give defendants in this action any greater latitude, than they are entitled to in the common law action.

Our attention was called, in the argument, to *Snow* v. *Witcher*, 9 Ire. 340. There is nothing in that case, opposed to our present decision. Then the charge was general. The defendant had selected no individual with whom he had connected the plaintiff, and the substance of that case is, that conception and delivery did not make

a part of the charge, and for that reason need not be proven. It was enough for the defendant, by his plea, to aver, that the plaintiff had had criminal intercourse with the witness. But here the charge is *particular*.— The defendant, at the time he spoke the words, selected Nelson Haggins as the man, and he cannot be allowed, in his plea, to shift his ground.

The declarations of the husband ought also to have been rejected, because he did not allude to Haggins.— We do not concur in the other reason suggested, that his wife ought not to be affected by his declarations. He is a party of record, is bound for the costs, entitled to the recovery, and could not be examined as a witness. The influence, that such declarations ought to have, is for the jury.

PER CURIAM Judgment reversed and *venire de novo*.

MARIA C. FEATHERSTON vs. WILLIAM FEATHERSTON.

Where there is a contract for the sale of a slave, and the question was, whether it was the intention of the parties that the contract was to be considered executed or only executory, the Court cannot decide that question, but must leave it to the jury.

The cases of *Henry* v. *Patrick*, 1 Dev. & Bat. 358, and *Caldwell* v. *Smith*, 4 Dev. & Bat. 67, cited and approved.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term 1850, his Honor Judge CALDWELL presiding.

This is a suit in trover, to recover the value of a negro boy, named John. The plaintiff relied on the deposition of one Hawkins to shew title. It is in the following words: "That in July 1844, he, Robert Hawkins, was in Henderson County, N. C, about dividing the property of Berryman Featherston, deceased, and the said M C. Featherston and William Featherston were both there, and a division of the negroes took place, and, in the said division, a negro boy named John, aged about three years, fell in a lot to William Featherston, after which the said William Featherston traded him to M C. Featherston for two hundred dollars, it being the amount that the said boy was valued at to the said William Featherston The trade took place on Saturday some time in July 1844, and he saw M. C. Featherston pay William Featherston between fifteen and twenty dollars in silver, and the said M. C. Featherston offered to give her note for the balance due and demanded a bill of sale, and they agreed to draw the writings on the Monday following, and the trade being made and assented to by the parties, William Featherston delivered the said negro boy John to M. C. Featherston, with that understanding, that they would draw the writings on the Monday following." The plaintiff lived with her mother and owned other slaves, and her mother owned the mother of John; and it was a matter of contest on the trial, in whose possession John was, up to the time, when the defendant in some way got possession of him, some two years after the trade. It did not appear that any bill of sale had ever been executed, but there was evidence, which tended to shew, that a note had been executed by the plaintiff to the defendant for some purpose. A witness testified that he knew of no dealings between the parties. It was insisted for the defendant, that, supposing Hawkins' testimony to be true, it was an executory contract, and no title passed. The Court was of opinion, that it was an executed contract, according to the

said Hawkins' testimony, and that a title to the boy John passed to the plaintiff, and so charged the jury. A verdict was rendered for the plaintiff, and from the judgment thereon the defendant appealed.

Gaither, for the plaintiff, submitted the following authorities:

Bateman v *Bateman*, 2 Dev. 97. *Choat* v. *Wright*, 2 Dev. 289. *Mushat* v. *Brevard*, 4 Dev. 73. *Eppes* v. *McLemore*, 3 Dev. 345.

N. W. Woodfin and *Baxter*, for the defendant.

NASH, J. When his Honor, the presiding Judge, pronounced his opinion in this case, he entirely overlooked those of *Henry and Patrick*, 1st Dev. & Bat. 358, and *Caldwell and Smith*, 4 Dev. & Bat. 67, or drew a distinction in principle, between them and the present case, which the facts do not warrant. In the first case, the defendant sold to the plaintiff a negro; the price was agreed upon and the boy delivered. The value was to be paid in a bond, which the plaintiff then held upon the defendant. The bond not being present, it was agreed, that, in a few days, the defendant would call at the plaintiff's house, execute a bill of sale and receive the bond. The plaintiff took the boy home with him. The contest between the parties there, as here, was, whether the contract was an executed, or executory one, to be completed by the executing of the bill of sale by the defendant and the delivery of the bond by the plaintiff. The Court decided, that it was a question of fact for the jury, as to the intention of the parties, and not one of law. The Court could not decide upon the intent. This case governs the one before us; the only fact differing the latter is, that, at the time, a small part of the purchase money was paid by the plaintiff. This, we think, makes no material difference between the cases, in principle. Property in slaves can

be passed in two ways; either by sale and delivery or by deed. Here the parties, at the time the terms of the contract were agreed on, agreed that the note for the balance of the purchase money and the bill of sale were to be executed and delivered at a subsequent day. Was the boy John, then, delivered, at the time, as the property of the plaintiff, under the parol contract, and the bill of sale to be given as further assurance or evidence of title? If so, the contract was complete. If the boy was put into her possession, but not as her property, until a bill of sale was executed and a bond or note for the residue of the purchase money was delivered, and it was the understanding of the parties, that the title should not be changed, until those things were done, then the contract was not completed by the delivery of John and the payment of a part of the purchase money. Which was the intention of the parties, was a question of fact for the jury to ascertain. We think his Honor erred, not in the conclusion, which he drew from the facts—upon that we have no right to express an opinion—but that he assumed the jurisdiction of the jury, in drawing any conclusion, as a matter of law.

Per Curiam. Judgment reversed and *venire de novo*.

DEN ON DEMISE OF JOSEPH BROOKS & AL. *vs.* BENJAMIN RATCLIFF.

Where the land of a debtor has been sold by execution and an action is brought against him to recover possession, he has no right to object that the sheriff has not made the deed to the purchasers at the execution sale, since the sheriff may convey to an assignee, whether he be an assignee by law or by contract.

In cases of verdicts, subject to the opinion of the Court, all the points, on which either party means to insist, ought to be reserved, for all points not reserved are taken to be given up. If one of the parties cannot have inserted a question, on which the presiding Judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim that an opinion shall then be given to the jury, as he has a right to do.

Where an action was brought in the name of James Brooks, William R. Colton and William R. Churchill, partners trading under the name and firm of "Brooks, Colton and company," and the judgment was in the name of Brooks, Colton & Co., *Held*, that this was a variance, for which the judgment might have been reversed at common law, but the error was cured by our Statute of Amendments, Rev. Stat. ch. 3, sec. 5.

A purchaser of land at an execution sale gets a good title, although the sale was made on a Tuesday or Wednesday of the week, on the Monday of which the writ was returnable, but was not returned.

A deed, after reciting a sale of land by execution, proceeds thus: "In consideration, &c., the said P. R. sheriff, &c., doth hereby bargain, sell, alien, enfeoff, convey and confirm *with* the said James T. Brooks, &c., their heirs and assigns, &c., to have and hold the same *to* the said, &c., their heirs and assigns." *Held*, that the use of the word *with* does not affect the sense or operation of the instrument; as, upon the context, it is evident, between or with whom the contract is, and by and to whom the estate is conveyed.

The cases of *Testerman* v. *Poe*, 2 Dev. & Bat. 103, *Wall* v. *Jarrett*, 3 Ire. 42, *Barnard* v. *Etheridge*, 4 Dev. 295, *Gibson* v. *Partee*, 2 Dev. & Bat. 530, *Pope* v. *Bradley*, 3 Hawks. 16, *Lanier* v. *Stowe*, 1 Hawks. 229, and *Mordecai* v. *Speight*, 3 Dev. 428, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Special Term in February 1850, his Honor Judge CALDWELL presiding.

The lessors of the plaintiff set up a title, by virtue of a sheriff's sale under a judgment and execution against the defendant, Rateliff. By the transcript of the record it appeared, that the action was debt by James S. Brooks, William E. Colton, and William E. Churchill, partners trading under the name and firm of "Brooks, Colton and Company," upon a bond given by the defendant to "Brooks, Colton & Co." and that, a *fieri facias* was issued thereon, running also in the name of "Brooks, Colton & Co.," by virtue of which the sale was made, under which the plaintiff claims. For that variance or defect, the counsel for the defendant insisted, he was entitled to a verdict; but the Court held otherwise. The plaintiff then gave in evidence the return of the sheriff on the execution, that on the 4th of October, 1842, he sold the premises to the plaintiffs in the said execution, and also a deed from the sheriff, dated September 18th, 1846, to James S. Brooks, William E. Churchill and William M. Colton and Eli Colton, in which is recited the levy of the execution and the sale of the premises to James S. Brooks, William E. Colton and William E. Churchill, copartners under the firm of Brooks, Colton & Co, and that, afterwards, the said William E. Colton died and left surviving him the said William M. Colton and Eli Colton, who were the only children and heirs at law of the said William E. Colton, deceased; and then the premises are conveyed therein to the said four persons, James S. Brooks, William E. Churchill, and William M. Colton and Eli Colton, in fee. After those recitals and stating the price bid and the payment thereof, the deed proceeds thus: "In consideration, &c., the said P. R. Sheriff, &c. doth hereby bargain and sell, alien, enfeoff, convey and confirm with the said James S. Brooks, &c. their heirs and assigns all, &c. to have and to hold the same to the said, &c., their heirs and assigns." By reason of an alleged defect in the deed in using the word "with" instead of "to" in the conveying

part, the counsel for the defendant insisted, that it did not pass the title to the lessors of the plaintiff. But the Court held to the contrary. The defendant then called, as a witness, the sheriff, who made the sale; and he deposed that he did not sell on the first Monday of October 1849, (which was the return day of the execution,) but that, at the request of the defendant, he postponed the sale from Monday until Tuesday and again from Tuesday to Wednesday of that week, and that on this last day the sale was made. The counsel for the defendant, thereupon insisted, that if that testimony was true, the said sale was void; but the Court held, that it was, nevertheless, valid. The counsel for the defendant, thereupon, excepted to the opinions of the Court upon those several points. The counsel for the defendant then insisted, that, for as much as there was no evidence, besides the recitals in the sheriff's deed, that William E. Colton had died or that William M. Colton and Eli Colton were his heirs, the plaintiff could not recover.

The Court gave no opinion thereon to the jury, but, by the request of the counsel in the cause, the point was reserved; and thereupon a verdict was taken for the plaintiff, subject to be set aside and a non-suit entered, if the Court should be of opinion on that point for the defendant; otherwise, judgment to be entered on the verdict. Afterwards, the Court set the verdict aside and ordered a non-suit, and the plaintiff appealed, and then the defendant appealed also.

N. W. Woodfin and J. G. Bynum, for the plaintiff.

J. Baxter and Gaither, for the defendant.

RUFFIN, C. J. Upon the point reserved, the case of *Testerman* v. *Poe*, 2 Dev. & Bat. 103, and those referred to in it, are direct authorities against the judgment. The sheriff may rightfully convey to the assignee of the pur-

chaser, and it is not material, whether he be assignee by contract or by law. But, in truth, that is a matter with which the debtor in the execution has no concern; it being altogether between the sheriff, the bidder and the alleged assignee. In this case, indeed, the acquiescence by the sheriff and two of the partnership, which purchased the land, jointly with two persons purporting to claim as the children and heirs of the other partner, furnishes a presumption of the existence of those facts; since, otherwise, it would be against the interest of the supposed survivors thus to take the deed. But our opinion does not go on that ground alone, nor, even, chiefly. It proceeds on the broader one, that the objection is not one, which the defendant has a right to raise. It was, therefore, erroneous to set aside the verdict, and there ought to have been judgment on it for the plaintiff, according to the agreement of the counsel. Consequently, that judgment must now be given here.

It will be thus perceived, that the defendant has precluded himself from taking advantage of any error, which might have been committed in ruling the other points against him. For, although a plaintiff may, doubtless, appeal from a judgment for him, if it be, for example, for less than he was entitled to, yet we do not see, how a defendant can bring a writ of error or appeal upon a judgment in his favor, since it is of no consequence to him upon what ground he is discharged. In cases, therefore, of verdicts, subject to the opinion of the Court, all the points on which the party means to insist, ought to be reserved. If one of the parties cannot have that done, in respect to a question, on which the presiding Judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim, that an opinion shall then be given to the jury, as he has a right to do. By consenting that the judgment shall depend on this or that particular question, all others are necessarily taken to be

given up. These observations are made to prevent an oversight of the kind in future; for it so happens, that in the present case, the opinion of this Court concurs on each point with that given against the defendant in the Superior Court, and, therefore, he suffers no prejudice from the manner in which the case was brought up.

There is no variance between the judgment and execution; both being in the name of the firm of "Brooks, Colton & Co." There is, no doubt, such error in the judgment would have been cause for reversing it at common law. But the statute of amendment cures it by the provision, that no judgment shall be reversed for any mistake in the name of any party or person, when the correct name has been once rightly alleged in any of the pleadings or proceedings. Rev. Stat. ch. 3, sec. 35.—*Wall & Holton* v. *Jarrott*, 3 Ire. 42. If the judgment could not be reversed, the execution which conforms to it, must, of course, be supported. It is said, indeed, that there was no judgment rendered in the action of debt.—But we must hold to the contrary. First, that objection was not taken on the trial: If it had been, it would have been untenable, as we have had many cases, in which it was held, that although the judgment be not formally entered, yet, that, upon a verdict, which, connected with the pleadings, authorized a judgement, one shall be intended and the minutes be taken for the judgment, if a formal entry could be made up from them. *Barnard* v. *Etheridge*, 4 Dev. 295. *Gibson* v. *Partee*, 2 Dev. & Bat. 530. The Courts, being aware of the indulgence, which counsel and attornies extend to each other upon these parts of their duty, are obliged to admit such intendments, in support of rights derived under judicial proceedings.

The act, which requires sales to be made at the Court House on the same Monday of each month, on which the court of the county sits, expressly authorises the sheriff to postpone the sale from day to day, for any of the rea-

sons mentioned in the act; and it has been held, that in respect to the postponement of the sale, the act is directory, and, therefore, that the purchaser is not bound to see that the officer complied with his duty in that respect, any more than in duly advertising, or selling all the personalty before offering the land. Hence a purchaser on Tuesday or Wednesday gets a good title; and it is settled, that he does so, although his purchase be on those days of the week, on the Monday of which the writ was returnable, but was not retained. *Pope* v. *Bradley*, 3 Hawks. 16. *Lanier* v. *Stone*, 1st Hawks. 220. *Mordecai* v. *Speight*, 3 Dev. 428.

Upon the remaining point, as to the effect of the use of the word, "*with*," in the conveying clause of the deed, the Court is of opinion, that it is an inaccuracy, which does not affect the sense or operation of the instrument, as upon the context, it is evident, between whom or with whom the contract is, and by and to whom the estate is conveyed. On the whole case, therefore, the judgment must be reversed; and, the Court, proceeding to give such judgment as the Superior Court ought to have given, the verdict must be reinstated and judgment rendered thereon for the plaintiff, in conformity to the agreement between the parties.

Per Curiam. Judgment reversed and judgment for the plaintiff.

DEN ON DEMISE OF JAMES GIBSON *vs.* FREDERIC WALKER.

A man, being bound to maintain and support his father, conveyed a tract of land to his brother in trust to perform the conditions of that bond in the first place, and then out of the proceeds of the land to pay the other creditors of the maker of the deed. In the deed was contained the following clause: "The manner of executing the deed, as to the support of my father," is left to the discretion of the maker of the deed. *Held*, that this did not make the deed, on its face, fraudulent in law, for it reserved to the maker no control over the fund, but only the manner, in which the father should be supported.

The fact, that the debt to the father was prospective, as well as immediate, does not make it illegal to give it the preference.

The cases of *Moore* v. *Collins*, 3 Dev. 126, *Hafner* v. *Erwin*, 1 Ire. 490, and *Cannon* v. *Peebles*, 2 Ire. 449, cited and approved.

Appeal from the Superior Court of Law of Rowan County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

H. C. Jones, for the plaintiff.
Boyden, for the defendant.

NASH, J. In 1825, William Gibson, James Gibson, Hugh Gibson and John Gibson, executed to their father, Joseph Gibson, a written obligation, in the penalty of five hundred dollars each. The condition set forth that the parties are "the sons and heirs of Joseph Gibson," and having received and expecting to receive, titles to the whole of the land of said Joseph, bind themselves to discharge all the debts of their father, then due or to be afterwards contracted, and to maintain him during his natural life, and to bury him decently. In 1841, John Gib-

son conveyed to his brother James, the lessor of the plaintiff and who was one of the parties to the contract of 1825, the tract of land in dispute, subject to the following condition and proviso: "The condition of the above obligation is such, that, whereas the said John Gibson is bound by bond, in the sum of five hundred dollars dated the 29th of April 1825, together with William Gibson, James Gibson and Hugh Gibson, in a like sum for the support of Joseph Gibson, their father, during his life time. Now, therefore, the condition of this deed is, that the said James Gibson shall well and truly do and perform the covenants and contracts contained in the said bond, by maintaining and supporting the said Joseph during his life, and by burying him in a decent manner, &c., and also, that the said James shall out of the proceeds, &c, pay certain debts therein enumerated." The deed then provides, but it is understood and agreed, "that the support and maintainance of my father is to have the preference of all other of these claims. After this is performed, the debts of these other creditors are to be paid by the sale of said land, in such manner as will make the said land bring the most money. The manner of executing the deed, as to the support of my father, is left to his, said John's, option and discretion. The surplus, after the above trusts are performed, is subject to my order." At the time the deed of trust was executed, John Gibson, the grantor, was indebted, was sued and judgment obtained, and a *fi. fa.* issued, and was levied on the land in dispute, and, at the sale, the defendant became the purchaser, and this action is brought by the trustee to recover the possession. His Honor, the presiding Judge, ruled that the deed of trust, upon its face, was fraudulent and void, as against then existing creditors of John Gibson, and that, therefore, the plaintiff could not recover in this action. The plaintiff then submitted to a non-suit and appealed.

We are not informed upon what provision in the deed, his Honor's opinion rested. It is necessary, therefore, to examine it in all its parts. Does the first provision for the support of Joseph Gibson, the father, make it so?—John Gibson was indebted to his father in the sum of five hundred dollars for his maintainance—his father was, therefore, a creditor, and it was as much the intention of the deed of John in conveying his land, to secure that debt as any other—nor does the fact of his giving that debt the preference over the other debts, and postponing them until its discharge, render the deed, in law, fraudulent.—So far the deed of trust presents the ordinary case of a debtor making an assignment of property for the payment of his debts, and classifying the claims or designating the order in which they are to be paid: This is not illegal. *Moore* v. *Collins*, 3d Dev. 126. *Hafner* v. *Irwin*, 1st Ire. 490. The debt to the father existed from 1825, and is, by the maker of the trust, placed in the first class. Does the fact, that the debt to the father is prospective as well as immediate, make it illegal to give it the preference? Surely not. A man may secure a future or contingent debt as well as a present one. Take this case; a man, considerably in debt, procures a note to be discounted in Bank with a view to pay his creditors; in order to procure sureties, he is required to mortgage real estate to secure them: now whether he will ever pay that debt or his sureties be called on to pay it, is contingent, and depends upon the fact of his failure to pay the necessary instalments. This contingency, however, cannot make the security void in law. But, again, a man, who owes debts, purchases a tract of land, and gives to the vendor a lien upon it for the purchase money, either by mortgage or trust—this does not make the latter void in law. The maker of the trust or mortgagor does nothing, the law condemns. This feature in the deed of trust did not make it, in law, fraudulent. *Cannon* v.

Peebles, 2d Ire. 449. Our attention in the argument was drawn to the last clause, but one, in the deed of trust, "to-wit," the *manner* of executing the deed, as to the support of my father, is left "to his, said John's, option and discretion." This reserves to John no control whatever over the fund conveyed, but only the manner in which the father shall be supported. Several persons were so bound, and the maker of the trust intended not to leave that to the arbitary control of the trustee, but, as to the manner of the support, to reserve it, to be arranged between him and his brothers, as that he should board with the one or the other, and *that his* contribution should be in money or specific articles. It is true, that when the maker of a deed of trust to secure his creditors, reserves to himself the power of revoking it, and declaring other trusts, whereby an interest or benefit may accrue to himself, the conveyance is fraudulent and void; but this is not such a case. The last clause is, "the surplus after paying all the debts is to be returned to the maker." This provision is only putting in words what Equity would declare "to wit," a resulting trust for the maker after the debts are all paid. The deed of trust is not, upon its face, fraudulent—but it was a proper matter of enquiry for the jury to say, whether it was the intention of the maker of it to defraud his creditors or any creditor, in the collection of these debts, contrary to the provisions of the Act of the General Assembly.

Per Curiam. Judgment reversed and *venire de novo*.

WILFORD TURNER ex. ANDREW BEGGARLY & AL.

Where a note or bond is assigned after it is due, the assignee holds it subject to all the set-offs and payments to which it was subject in the hands of the payee.

Otherwise, when the note or bond is assigned before it is due, unless the payments are endorsed on the instrument.

The case of *Haywood* v. *McNair*, 3 Dev. 231, and 2 Dev. & Bat. 283, cited cited and approved.

Appeal from the Superior Court of Law of Iredell County, at the Fall Term 1849, his Honor Judge CALDWELL presiding.

The defendant, Beggarly, gave to Isham Gaither his bond for $173 50, dated February 19th, 1847, and payable at twelve months. On the 29th of July 1847, Gaither deposited the bond with the plaintiff, and they executed an agreement in writing, that it was so deposited "to make the said Turner safe for the amount said Gaither is due him and also as his surety in all cases; and whenever said Gaither shall pay said Turner and release him as the surety of said Gaither, the above bond is to be said Gaither's, and, otherwise, to be the said Turner's." On the 1st of October 1847, Gaither inclosed the bond to the plaintiff and, soon after it fell due, this action of debt was brought on it, and the defendant pleaded payment, and the set off of certain sums, which Gaither owed to him, Beggarly. In support of those pleas, the defendant offered to give in evidence the following notes made by Gaither: One dated in 1846 and payable to Beggarly one day after date; another dated September 1st, 1847, and payable to Beggarly, one day after date; one payable to one Gray,

September 2nd, 1846, and endorsed by Gray to Beggarly, July 19th, 1847. The counsel for the plaintiff objected to receiving them in evidence, but the Court admitted them. Evidence was then given on the part of the defendant, that, shortly after giving the bond which is sued on, the plaintiff applied to the defendant to take up certain debts, which Gaither—then and during the year 1849, in the defendant's employment at wages of $26 a month—owed to the plaintiff, which the defendant refused, telling the plaintiff "the thing is nearly up;" and also that, between the 7th and 12th of September 1847, the defendant applied to the plaintiff to let him see the bond and the written agreement of the 29th of July, 1847, in his possession, and that the plaintiff then showed them to the defendant, asking him if he wished to pay the bond, and the defendant replied, "I am ready to pay according to my contract with Gaither, and it is about paid off to Gaither."

The Court instructed the jury, that, although the bond was assigned to the plaintiff before it was due, it was liable to all defences by the obligor, which he could set up against the obligee, provided the plaintiff had notice of those defences at the time of the assignment, or such information as would put a prudent man upon enquiry; and, therefore, that in this case, if they believed that Turner had such information, they should allow, as set offs, all the debts to the defendant up to the 1st of October, 1847. The counsel for the defendant then moved the Court to instruct the jury, that the defendant was not entitled to claim, as a set off, any of the said debts, which arose to the defendant after he had notice of the deposit of his bond with the plaintiff, upon the agreement of the 29th of July 1847. But the Court refused, and then told the jury, that the deposit and separate written transfer made no difference, whether the defendant knew of them or not, and that, up to October 1st, 1847, the plaintiff stood in Gaither's shoes, provided he had notice of the al-

leged payments and set offs. The jury thereon found payments for $152 29, and that, after deducting the same, a balance of $21 21 was due for principal money on the bond declared on and assessed the damages for interest to $2. After judgment the plaintiff appealed.

Osborne and *Thompson*, for the plaintiff.
Craig and Boyden, for the defendant.

RUFFIN, C. J. Notes over due are deemed dishonored, and, one, who takes them in that state, is considered, at this day, as taking them upon the credit of his endorser, and is to stand in the place of the holders at or since its maturity. It is commonly said in such a case, that the bill or note is affected in the hands of the endorsee by all the equities between the original parties. That form of expression is proper and strictly true, in relation to such defences as the maker could set up in a Court of Equity against the payee, for, whenever the debtor, in the view of the Court of Equity, ought to be relieved from the payment of the debt, either because of some original vice in the contract or because of a counter-demand, or other sufficient reason. it is against conscience in the holder of a security of this kind, to attempt to defeat the debtor of the benefit of such an equitable defence, by making an assignment of it. Therefore, an assignee after maturity is, in equity, held to take the note, as his assignor had it. But, if the defences of the debtor be equitable in their nature, that is, cognizable in the Court of Equity and not in a Court of Law, as between the original parties, the jurisdiction is not changed in respect of such defences by the fact of the security being endorsed. It is true, the same form of expression, that an over due note is liable after endorsement to all equities, is often used in Courts of Law, and in books, which treat of the legal rights of the assignee and debtor. But, it is not in reference to the legal

rights of those parties, an accurate mode of speaking, for, as Chief Justice Henderson said in *Haywood* v. *McNair*, 3 Dev. 231, "The equities of the parties which attach to a contract of this kind, can no more be examined in a Court of law, than any other equities. Therefore, defences founded on mere equities must be made in equity; and the law takes notice only of such defences as are of a legal nature. The meaning then, of thus speaking in a Court of law is, that a note, transferred under dishonor, is subject to the legal exceptions to its payment in the hands of the assignee, to which it was liable in the hands of the payee." Accordingly, in that case, the Court declined entering into mere equities between the parties, but held the defendant entitled to the same legal defences against the note in the hands of Haywood, to which it was subject in the hands of Barnes at the time of the assignment by him to Haywood. Upon the strength of the case of *Burrough* v. *Moss*, 10 B. & C. 558, just then reported in this country, a second action was brought by Haywood, and the questions before decided were re-examined by the Court, and the opinions before given were again affirmed. It was held, that if the debtor had a right to a deduction or set off against the plaintiff, at the time of the assignment, he should, although the set off or deduction did not attach to the particular note or bond, have the same right after the assignment, and that he might have the benefit of such right upon the general issue, if sued in assumpsit or by special plea, if sued in debt on a bond: but that the defence, thus set up, must be one for the original debtor, if sued by the obligee at law, and not one which would be merely a ground for relief in equity. *Haywood* v. *McNair*, 2d Dev. & Bat. 283. The utmost extent, then, to which, at law, this doctrine, that an assignee is affected by the liabilities of his assignor, has been carried, is, that he shall be thus affected in respect of such liabilities, as existed at the time

of the assignment and constituted a demand, which was then available, as a defence at law. The proposition, thus stated, obviously excluded from its operation, notes and bonds endorsed before due. There may be a few cases of bills, perhaps, which might be admitted as exceptions: as if a bill were noted for non-acceptance, and then wrongfully endorsed by one, who held it for the benefit of the drawer or the like; then the instrument carries its dishonor on its face, though not due; but in respect to notes or bonds, not at maturity, it is not seen, how any defences arising out of counter-demands between the original parties can be let in. They were not available at the time of the assignment. Indeed, in *Burbridge* v. *Manners*, 3d Camp. 192, Lord Ellenborough, admitting that payment at maturity extinguished a bill or note and that it could not be re-issued, declared distinctly, that payment meant a payment in due course, and not in anticipation, and therefore, that a subsequent assignee for value before a maturity could recover on the security.—For, as Mr. Justice Buller said in *Brown* v. *Davis*, 3 T. R. 80, a transfer of a note, before it is due, carries no suspicion with it, and the assignee receives it on its intrinsic credit: and, as Mr. Chitty adds, he is not bound to enquire into circumstances, existing between his assignor and any of the previous parties to the paper, as he will not be affected by them. Chitty on Bills, 14 Story's Edit. 1819. It would clog in an inconvenient and dangerous manner the circulation of negotiable paper, if such prepayments could affect its validity, when left in existence, with no note of the fact on it; much less can it be affected by a counter demand of the maker or the payee—at least at law. Under what form of pleading could the defence be presented? There was clearly no payment here. It is not a set off of a debt against the indorsee; nor a set off of a debt of the assignor, available at the time of the assignment, since at that time there could be

no action by any one on the assigned instrument. If there were any equities, which tied up the hands of the payee from justly parting from the paper, another tribunal may give relief against the assignee on the ground of them, if they can be brought home to him; as if he had agreed to apply these demands to the debt; then being insolvent, endorsed it with notice. But in such a case, on the other hand, a Court of Equity would not confine its enquiry to the effect of the legal assignment, by endorsement, but would have regard to an assignment, as a security or by a separate agreement in any form, which constitutes a contract of assignment in that court. We do not propose, however, entering into those considerations, taking notice of them only to show, that they present points peculiarly belonging to the Court of Equity and which cannot be acted on at law, without danger of doing injustice to one or both of the parties. Here, the plaintiff took the bond by endorsement, at a time when the defendant could make no defence against it, and it was not questioned on the trial, that he gave value for it and holds it for himself. It is impossible for juries duly to estimate the circumstances, which ought to put a person on enquiry, and thus affect him with notice of a counter demand or other equity, and the attempt to do so would often work great injustice. It is safest, therefore, to rely upon the broad distinction, founded upon the time of transfer, that is, before and after the maturity of the paper—in the latter case, allowing to the debtor all the defences he could have had against the obligee, if sued at law by him: but in the former, passing the paper effectually at law, according to its tenor in its face or memorandum on it, and leaving the debtor to such relief in equity, as by the rules of that court affect the conscience of the assignee.

Pearson, J. I think there was error in both of the grounds, assumed as the basis of the decision, in the court below.

There was error in the legal effect given to the agreement, as to the mode in which the note was to be paid. That agreement did not have the effect of a payment, or any other legal defence; it was a confidence in trust, or understanding, that the debtor should be at liberty, when the note became due, to make payment in such debts or demands against the creditor, as the former should pay off for the latter: it was a trust or agreement, which Equity would prevent the creditor from defeating, and to which, it would subject a purchaser, who acquired the legal title, provided his conscience could be affected by proof of notice; in the same way, as one, who takes the legal estate in land from a trustee, is required to perform the trust, provided he had notice, on the ground that he was *particeps criminis* in the breach of trust. But this is a principle which does not obtain at law. There, the legal title prevails, and, under the statute, the plaintiff in this case became the legal owner by the endorsement.

I confess, it is difficult for me to conceive, how there can be a payment or any legal defence (other than such as avoids it *ab initio*) to a debt, before it is due; but make the supposition, there was also error in the idea, that, in a Court of Law, it was admissible to show, that the endorsee had notice before the endorsement, and upon the ground of such notice, defeat his legal title. A Court of Equity assumes, that the title passes, and the remedy proceeds on the ground, that the purchaser or endorsee, should be declared a trustee, by reason of his being affected with notice. This mode of giving relief never has been attempted in a court of law.

If money be accepted, as a payment, before the note falls due and it is endorsed as such on the note, the legal

effect is, to extinguish the note to that amount; its existence only continues as to the balance due, which is all that can pass by the endorsement. The effect is the same, as if the first note had been cancelled and a new note given; in other words, when payments are endorsed, the endorsee takes the note in its "then state and condition," and acquires title only to such part, as in law has an existence.

But if money be accepted as a payment before the note falls due, its legal effect is not to operate as a payment, so as to make an extinguishment to that amount. It is a mere agreement, trust or confidence; that it *shall be applied* as a payment, when the debt is due; it is a thing not done, but only agreed to be done, and, if the note is endorsed, the whole legal title passes, and the party can only have relief by commuting the purchaser into a trustee. A contrary rule would subvert the whole system of the negotiability of notes, which it has been the policy of our Statutes to extend.

The doctrine, in reference to notes endorsed after maturity, is fully discussed and settled in *Haywood* v. *McNair*, 3 Dev. 231,—same case 2 Dev. & Bat. 283, and in the opinion of the Chief Justice in this case, in which I fully concur.

Per Curiam Judgment reversed and *venire de novo*.

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JOHN W. FOSTER *vs* NICHOLAS W. WOODFIN.

Where a man has conveyed a personal chattel, but still retains the possession, his acts and declarations, even subsequent to such conveyance, while he continues in possession, are evidence against the vendee or grantee, on a question of fraud.

Where a man makes an absolute conveyance of a chattel, purporting to be either a sale or a gift, and continues for a long time in the possession of the chattel, so purported to be conveyed, this creates, in law, a strong presumption, on which the jury should find the conveyance fraudulent, as against creditors, unless opposing and explanatory circumstances should rebut the presumption.

Fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to the grantor, upon his continuing in possession, such effect as to them, in each case, may seem proper, but, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law

The cases of *Askew* v. *Reynolds*, 1 Dev. & Bat. 367, and *Gregory* v. *Perkins*, 4 Dev. 50, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Special Term in February 1850, his Honor Judge CALDWELL presiding.

This is trover for a slave, Lucinda, and her children, and was tried on the general issue. Both parties claimed under one Benjamin Ratcliff: the defendant, as a purchaser at a sale under execution, and the plaintiff, under a conveyance to his wife, who was a daughter of Ratcliff. The question was, whether the deed to the daughter was *bona fide*, or fraudulent against the father's creditors.

The plaintiff produced the bill of sale to his wife, dated in March 1835, and proved its execution by the subscribing witness, who was a son of Benjamin Ratcliff.— It purported to have been made in consideration of $400 then paid and was proved and registered in July 1847. The witness further deposed, that no money was paid, and that no person was present at the time, but the members of the family: and that the father said, that he made the deed with a view to a division of his slaves among his children. Further to support the issue on his part, the plaintiff produced as a witness the said Benjamin Ratcliff; and he deposed, that he executed the said bill of sale at the time it bears date, and then delivered it and the said slave, Lucinda, to his daughter, who was then married to " the plaintiff and lived about a mile from the witness; that the said Lucinda was then about six years old, and was not sold by him, but was intended as a gift to his daughter, and that she was not taken away by the daughter, but left by her to wait upon her mother, the wife of the witness, who was then sickly: That, at that time he owned a negro man and three other negro girls, two of whom were older than Lucinda, and also owned a tract of land of the value of $2000, a wagon and team and other stock, and did not owe as much as fifty dollars; and that there was no fraud in his gift to his daughter: That in 1838 and 1839, he became involved in debt as surety for the subscribing witness to the deed and another son: That therefor the judgments were obtained, under which the defendant purchased, and that in 1839 and in 1840, he conveyed all his other property to his children: that he continued in possession of said Lucinda up to 1843: and that, in that year, the plaintiff hired her to James Ratcliff, a son of the witness, who lived wi h him, and they worked the plantation on which the witness resided: and that, during that year, the sheriff came to his house with executions on

the said judgment, to levy on that slave and the others, and they were kept out of the way there about a week, and then Lucinda went into the possession of the plaintiff, who also kept her out of the way of the sheriff, and held her until she was taken under the executions in 1847, and that during that period she had the two children."

On the part of the defendant, the judgments and executions, under which he purchased, were produced: and evidence was further given by several persons, that they had long resided near Ratcliff and the plaintiff, and that Ratcliff paid the taxes on the said Lucinda and claimed her as his own, until the sheriff endeavored to levy on her in 1843, and that they were in the habit of conversing with him about his property, and, before that time, had never heard, from him nor from any other person, of a conveyance or transfer of Lucinda to the plaintiff's wife. The defendant then offered to prove by a witness, that in 1842, a son of the said Ratcliff applied to the witness on behalf of his father to become his surety for an appeal from the County to the Superior Court upon one of the said judgments, and informed the witness, that as a security to him, his father said, he would execute a deed of trust for his negroes: that he, the witness, declined doing so, but went with the son to the said Ratcliff's house, and there, the father asked the son "whether he, the witness, had agreed to go into the arrangement," and the son replied thereto, "he had not," and that then the said Ratcliff, the father, said to the witness, "there is no danger." The testimony thus offered was objected to on the part of the plaintiff, but was admitted.

In summing up the case to the jury, the presiding Judge instructed them, that when a person makes such a conveyance of a negro, as that made by Ratcliff in this case and then continues in possession for eight years, using and claiming the slave as his own, there is such a repugnance between the transfer and possession as raises

a presumption of a secret trust for the donor, which is fraudulent, and also that, unless such possession be accounted for satisfactorily to the jury, the impress of fraud remains on the transaction: and then left it to the jury to say how far that presumption of fraud was repelled in this case. The counsel for the plaintiff then moved the Court, further to instruct the jury, that, if the testimony of the witness, Benjamin Ratcliff, was believed by them, they ought to find for the plaintiff, and the instruction was given as asked.

The jury found for the defendant and the plaintiff appealed from the judgment.

Gaither and J. Baxter, for the plaintiff.
J. G. Bynum and Avery, for the defendant.

Ruffin, C. J. The objection to the evidence is not well founded. The acts and declarations of the father, while in possession of the slave, as to the nature of his possession and claim of title, are evidence on those points, though they occurred after his conveyance to his daughter. *Askew* v. *Reynolds*, 1 Dev. & Bat. 367. Whether the statement of the son to the witness was competent or not, depends upon the question, whether the son was the father's agent to enter into the arrangement, as it was called, with the witness, or induce the witness to become the surety for the appeal upon the security of the negro Lucinda, and the other negroes. Upon that point it is very clear from the father's language to his son and the witness, upon seeing them, that the son had been sent by the father to the witness upon some agency or with some proposal; and, although not constituting direct or full proof of any agency, to the extent of engaging for the conveyance of these slaves by the father, yet it is equally clear that those acts and declarations of the son and father were evidence tending to shew such an authority in the son.—

They were, therefore, fit to be received and submitted to the jury for their consideration on that point. Indeed, coupled with the other evidence, that the father claimed and used the negroes as his own for so long a period, both before and after that date, the evidence raised a strong presumption that the son had authority from the father, to make to the witness the proposal he did; for, to what else did he allude, when he spoke of "the arrangement" and said "there was no danger in it?"

Of the instructions to the jury, the plaintiff, in the opinion of the Court, has no cause to complain. They are, of course, to be understood in reference to the facts of the case. They are, that a conveyance of a negro child of six years of age, supposing its date to be true, was made by a father to a daughter living within a mile of him, without any valuable consideration, though purporting to be for the large price of $400, and was followed by the continued possession of the father for eight years afterwards, and by his contracting large debts and making voluntary conveyances to his children of all his other property, in three or four years after its execution, the father, during that period, using and claiming and offering to convey the negro as his own, and the conveyance to the daughter being, for the whole eight years, not only unregistered, but concealed, so as to be unknown to the nearest neighbors and most intimate friends. Certainly, under those facts, the transaction is presented to our consideration in a most questionable shape, and a strong presumption of fact arises, that it was not fair but merely colourable, and, therefore, ought not to stand in prejudice to the debts contracted by the father on the faith of that property. That was not seriously resisted in the argument, but it was said that the presumption was purely one of fact, and therefore that it was the province of the jury, exclusively, to consider of its weight and it was erroneous in his Honor to make any observations on it. But that is

not the law, as it seems to the Court. There have been so many cases in this State, involving this doctrine, and it has been so frequently and so fully discussed here, as to make it unnecessary now to look beyond our own decisions for authority on it. As was said in *Gregory* v. *Perkins*, 4 Dev. 50, fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to a grantor, upon his continuing in possession, such effect as to them in each case may seem proper, but that, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law. It is true, that, in respect to the consequences of a grantor continuing in possession of a chattel, it was observed in that case, that, contrary to the rule as once laid down in England, we held, that it did not, *per se*, conclusively establish covin in the conveyance, but was to be left to the jury as matter of evidence. Yet it was further observed, that it was to be left to them "as a ground of presumption," that there was a secret trust or that the parties had a view to a false credit of the vendor, which would be more or less strong under all the circumstances of the parties, the subject, length of possession, and the notoriety of the title of the vendee and of its acquisition." And it was explicitly stated, that a conveyance by an owner in trust for himself, or his possession after an absolute conveyance, with a view to contract debts, on the credit of the property, of which such possession is "a ground of presumption," is in law fraudulent. In the subsequent case of *Askew* v. *Reynolds* already cited, the opinion of the Court is again given very distinctly to the same effect. After noticing the old rule, that the possession of a donor, after an absolute transfer of a chattel, established the fraudulent intent, so as to render any further enquiry as to its existence unavailing, the judgment of the Court proceeds to set

forth how far it had been modified. It states, that the doctrine had been so far overruled, as to allow explanations to be made to repel the inference of the unlawful intent. Still it was declared, that the repugnance between the transfer and the possession was such, as yet raised the presumption of a secret trust for the benefit of the grantor; which, while it admits, also requires, an explanation, and which, unexplained or not satisfactorily explained, establishes the fraud. And, in applying the principle to the case then under consideration, the Court said, that a possession for eight or nine months, after making the conveyance, was sufficient to impress upon the transaction the character of a fraudulent transfer, unless from other facts and circumstances, another character could be clearly assigned to it. It is useless to quote other cases, as what fell from the Court in those referred to plainly shews, that in such a case, it is deemed a reasonable and legal presumption, upon the grounds mentioned, that the conveyance and possession by the donor were fraudulent, open, indeed, to proof, or to inferences from other circumstances to the contrary. The very ground of admitting the evidence of such possession, as relevant to the question of fraud, is, that it tends to establish and raises a presumption, that the conveyance was not *bona fide*, according to its purport, and that the possession was calculated to deceive those who dealt with the possessor; and it would seem impossible, that it can be wrong to lay such ground before the jury, so as to enable them to perceive the more clearly the reasonable force of the presumption and the effect properly to be allowed to opposing and explanatory evidence. The instructions in the present case did nothing more than that. In truth they stated the presumption under consideration, its force and effect and its susceptibility of being rebutted, substantially as laid down and much in the same language used by this Court in *Askew* v. *Reynolds*. It was,

however, contended at the bar, that, since that case, the law had been altered by the 4th section of the Act of 1840, ch. 28. But that is clearly a mistake; the only provision of that section is, that a gift by one indebted at the time is not absolutely void as against his creditors, by reason merely of such indebtedness, without regard to the sufficiency of the property reserved by the donor for the satisfaction of his debts; the affirmative of which had before been held to be law (whether the donor or donee had the possession) upon the ground that the donor could not honestly give away his property to the defeating of his creditors. But that is, altogether, a different species of fraud from that here imputed and depends upon different facts and considerations; and the law touching this case is entirely unaffected by the statute. His Honor, therefore, was fully authorised by previous adjudications to lay the principle down to the jury as he did. Indeed, he went further on behalf of the plaintiff, than was strictly proper, in saying that the testimony of Ratcliff, the father, repelled the presumption of fraud, and, if believed, entitled the plaintiff to recover. It is true, that the witness denied there was a trust for himself, simply by saying, that a gift to his daughter was intended and that there was no fraud in the gift. But he failed entirely to account for the secrecy of the conveyance and its concealment for eight years, for the falsehood in setting forth the consideration in the deed, and for his long subsequent possession and apparent ownership of the other property, which, he admitted, he conveyed to his other children, whereby he was able to get credit to the value of all of it and perhaps more. Upon all those material points, he deposed to nothing, saving only, that he kept the negro—then six years old—to wait on his wife, who was sickly at that time. But that circumstance does not remove those grave grounds of suspicion and presumption of fraud, since he did not state, that his wife continued to

need or to have the girl as a nurse—a very poor one truly—or even that she lived through those eight years or any considerable portion of them. For the probable, and, in this case, the actual, deception of the persons, with whom he contracted debts, arising from his possession of the slave, and not only the apparent, but the claimed, property in her for such a length of time and from the omission of the plaintiff, for that period, to assert a title under the conveyance to his wife or to let its existence be known, the witness furnishes no reason or excuse whatever, but leaves the presumption raised by such deception to operate unimpeded. It is quite certain, therefore, that the plaintiff had all the advantage in the charge, which he could claim, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

THOMAS M. YOUNG vs. MARTIN BOOE & AL.

When a deed of trust for the payment of debts conveys a cotton factory &c., and in the deed are provisions, that the maker of the deed shall retain possession for eleven months and during that time his family may be supported out of the proceeds of the factory, *Held*, that these provisions did not make the deed fraudulent in law, upon its face, but, as the provisions might have been for the benefit of the creditors, as well as of the debtor, the question of fraudulent intent was one, upon which the jury must decide under all the circumstances.

Appeal from the Superior Court of Law of Davie County, at the Spring Term 1850, his Honor Judge DICK presiding.

This action is trover for a parcel of blacksmiths' tools, and the plea "not guilty." The plaintiff claims under a deed of trust made to him by Thomas McNeily, on the 2d of February 1849, and registered the same day. The deed conveyed to the plaintiff a piece of ground near Mocksville, containing 16 acres, known as the factory lot, on which are situated, the cotton factory building and other out buildings, together with the steam engine, grist mill, three wool carding machines, and all the cotton machinery, consisting of four cotton cards, pickers, drawing frames, two speeders, one card grinder, four frames containing 504 spindles, four reels, one banding machine, one yarn press and all the battins, one turning lathe with all its tools, and a variety of other tools, all the raw cotton on hand, and all the factory wood on hand: also a lot adjoining, containing one acre: also another lot, on which there is a blacksmith's shop, with all the smith's tools and one new wagon partly ironed: one house and lot, wherein McNeily resided, and his store house and lot, and all his household and kitchen furniture and library, and three horses and another wagon and gear, four head of cattle, all his corn, wheat, oats, hay, and fodder and four slaves: and the deed further assigned to the plaintiff all debts owing to McNeily by bond, note, account or otherwise, and all other property whatsoever, whether real or personal, to which the grantor was in any wise entitled: Upon trust, that the whole or such parts of the property, as should remain undisposed of, on the 1st day January 1850, should, after due notice, be sold by Young at public auction to the highest bidder upon a limited credit, and that, in the mean while, any part of the property might be sold at private sale, should a reasonable price be offered: and that, until such public sale, McNeily should remain in the possession and management of the property, as the agent of the trustee, and might also make private sales thereof as aforesaid, and that he should, "as

early as practicable," make out a complete list of all the judgments, bonds, notes and other debts of every description belonging to him, for the said Young: and that, out of the proceeds of such sales and with the sums collected on the debts, all necessary expenses of executing the trusts should first be paid by the said Young, and then certain enumerated debts, for which persons were bound as sureties: and thirdly, certain other debts specified, and also all others, which the said McNeily then owed, whether particularly mentioned therein or not—the said debts to be fully paid, if the fund should be sufficient therefor, and, if not, they should be paid *pro rata*. The deed then adds, "It is understood and agreed that the said McNeily is to support his family upon the property hereby conveyed, until this trust is closed by a sale of the property."

A short time after the execution of the deed, a judgment was rendered by a justice of the peace for one of the debts mentioned in the deed, and an execution issued thereon, under which the defendant purchased the tools for which the action is brought. The question on the trial was, whether the deed of trust was fraudulent, as against the creditors of McNeily existing at the time.—It was admitted by the defendant, that the debts mentioned in the deed were just and true, and that the property and effects assigned were not sufficient for their discharge, and also that there was no evidence of any actual fraud in the object of the deed: but it was insisted, on the part of the defendant, that the deed was fraudulent in law, from the stipulations on its face. By the agreement of the parties, a verdict was thereupon rendered for the plaintiff, subject to the opinion of the Court upon the question, as a point reserved, whether the deed was or was not thus fraudulent. The Court afterwards set aside the verdict and gave judgment of non suit, and the plaintiff appealed.

Osborne, for the plaintiff.
J. G. Bynum and *Avery*, for the defendant.

RUFFIN, C. J. Without the admission on the part of the defendant, that there was no actual fraud intended in the execution of the deed, the Court would hold the judgment to be erroneous. It is exceedingly difficult to find fraud, as a matter of law, unless it be so plain and express in the deed, as to constitute fraud in itself, without any inference of one fact from another, and thus appear so distinctly, as to admit of no explanation from extraneous circumstances. Where the conveyance is in trust for the maker, merely, or, upon no valuable consideration, in trust for his family, it has always been considered as constituting fraud; thus incapable of explanation. *Sturdevant* v. *Davis*, 9 Ire. 365. But where the provisions are, in the nature or under the circumstances of the particular case, equivocal, that is, may have been introduced for bad or good ends, taken as a whole, then the law cannot justly infer the dishonest intent, in order to avoid the instrument, but ought rather to presume good faith. Hence in such cases, the actual intent is a subject of enquiry by a jury and not of decision by the conrt. *Cannon* v. *Peebles*, 4 Ire. 204. It is argued, however, upon this deed, that it reserves to the debtor, himself the management and power of disposition of the property for nearly a year, and also that one of the trusts is for his own support and that of his family for the same period; and that the provisions establish a fraud. It may be yielded, that those parts of the deed afford just grounds of suspicion, but, certainly, they are not conclusive, of an intent to the prejudice of the creditors in the actual state of things, and, under which the deed would appear to have been made. A man, justly indebted beyond the value of his property, and indeed, in very large sums as stated in the deed, finds himself unable to meet his en-

gagements and go on with his business, and makes an assignment of every thing he has on earth—not reserving even the lawful allowance to insolvent debtors; and the principal part of the effects conveyed consists of a steam cotton factory and stock of cotton and wood. Now every one must know several things concerning such property in this part of the world—that its value is materially impaired by suspending its operations, and that there are but few persons among us, with skill and experience for its judicious management: and particularly, that there is no ready sale for such establishments, and a forced, public and immediate sale could, probably, be only made at a great sacrifice. Therefore, it may have been with no intent to his own benefit or to reserve to himself any wrong power, but with an eye single to the interest of his creditors in the mass, that the debtor here deferred the period, at which the sale should be made publicly, at all events for eleven months, and provided for fair sales in the meanwhile by private contract. He does not reserve that power to himself. That is not the fair construction of the deed. It is legally vested in the trustee by virtue of his estate, and the debtor was to act as "the agent of the trustee," and subject, therefore, to his approval of the contracts and receipt of the price got. It may have been, rather a stipulation for services by the debtor, than the reservation of a privilege or dangerous power for him. For, as he had conducted the business of the factory and a profit might result from working up the stock on hand, and other competent managers might not be readily procured hereabouts, it might have been important to the proper care and disposition of the trust fund, that this person should attend to the factory or seek purchasers either at home or abroad, and preserve and show the property. If those were the purposes of the agency to be performed by McNeily, they were beneficial, not to him, but to his creditors, to whom alone the fund belonged.—That they were, is rendered probable by the considera-

tion, that there is no allegation, that the debts were in judgment or even suit; and hence, it would have been almost entirely in the power of the debtor, if that had been his object, to have retained the possession and use of all the property for nearly that period by pleading to suits brought against him. As that provision, might, then, have been innocent, it must be so taken—as fraud is not to be presumed. Thus regarding that part of the deed, it affords evidence rebutting, or tending to rebut, the presumption of fraud, arising out of the provision in the conclusion of the deed for the support of the debtor's family out of the property. That provision, *simpliciter*, is undoubtedly fraudulent. But it is not, in this case, an isolated stipulation, by which a benefit is secured to the debtor in spite of the creditors, and without just compensation to them therefor. The support of the family is to be for the same period, for which the debtor was to serve the trustee, and it may be fairly concluded, that the former was in remuneration for the service. We are not informed, what were McNeily's qualifications for the business, nor what would be fair wages for him, nor the amount required for their support; and, if we were, the Court could not pass upon their weight, as they belong, important as these circumstances are, to the jury exclusively. It is apparent, therefore, that the questions, on which the validity of the deed depends, are questions of actual intent, and that the provisions of the deed, by itself, do not enable the Court to pronounce against it, but are proper for the jury in connexion with such facts *dehors*, as the parties may be able to adduce. If, however, that were otherwise, the admissions in the case, of the value of the property, the justice of the debts and that there was no actual fraud intended, are conclusive for the plaintiff. *Hardy* v. *Skinner*, 9 Ire. 191.

Per Curiam. Judgment reversed and judgment upon the verdict for the plaintiff according to the agreement.

ROSANNAH BRIGGS vs. CHARLES BYRD.

In an action of slander, when the charge is made by using a cant phrase or a nickname, or when advantage is taken of a fact, known to the persons spoken to, in order to convey a meaning, which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of shewing that the defendant meant to make the charge complained of; and, in such cases, there must also be an averment, that the words were so understood by the persons to whom they were addressed.

These averments are traversable and must be proven, and differ entirely from what are called inuendoes, which need no proof.

The cases of *Hamilton* v. *Smith*, 2 Dev. & Bat. 274, and *Watts* v. *Greenlee*, 2 Dev. 115, cited and approved.

Appeal from the Superior Court of Law of Yancy County, at a Special Term in July 1850, his Honor Judge BATTLE presiding.

N. W. Woodfin, for the plaintiff.
B. S. Gaither, for the defendant.

PEARSON, J. This was an action on the case for slander. The words charged in the declaration, were that the defendant, in speaking of the plaintiff on a certain occasion, said, if they did not mind, "he would make the tray of biscuit roar before Saturday night," intending thereby to impute to the plaintiff the crime of having stolen biscuit.

On the trial, a witness was called, who testified that on a certain occasion, the defendant and the plaintiff's father were quarrelling about the running of a fence, and

that, afterwards, as the plaintiff passed near where the defendant, the witness and one or two other persons were standing, the defendant said, that if they did not mind, he would make the tray of biscuit roar before Saturday night. The counsel for the plaintiff then proposed to ask the witness, if he did not understand the defendant to allude to the plaintiff and to intend to impute to her the charge of stealing biscuit, a report to that effect having been circulated in the neighborhood. The defendant's counsel objected to the question, so far as it related to the identifying the plaintiff, as the person intended to be charged, and to that extent the Court ruled it to be improper. The counsel for the plaintiff then asked the witness, whether he had not told the defendant, that he understood him to allude to the plaintiff and charge her with stealing biscuit, to which he answered, that he did. There was other evidence in the case, which it is unnecessary to state.—The defendant had a verdict and the plaintiff moved for a new trial, because of the rejection of the testimony in relation to the understanding of the witness, as to the plaintiff being the person intended to be charged by the defendant. The motion was overruled and a judgment given from which an appeal was taken

When a charge is made by using a cant phrase or words having a local meaning or a nickname, or when advantage is taken of a fact, known to the persons spoken to, in order to convey a meaning, which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of shewing that the defendant meant to make the charge complained of, and, in such cases, there must also be an averment, that the words were so understood by the persons to whom they were addressed, for, otherwise, they are without point and harmless.

These averments are traversable and must be proven, and differ entirely from what are called inuendoes, which need no proof, and in fact prove themselves, their office being merely to point out the meaning and give a greater degree of certainty than is usual in conversation or ordinary writing. *Hamilton* v. *Smith*, 2d Dev & Bat. 274. *Watts* v. *Greenlee* 2d Dev. 115. When the words in their ordinary signification designate the person and the offence, there is no necessity for an averment, and but little use in an inuendo. But when the words do not designate the person or the offence, an inuendo will not suffice, unless it be supported by the averment of some fact. For instance, if the words are "the queen has stolen biscuit," a simple inuendo, meaning the plaintiff, will not answer, and it is not necessary to support it by averment, that it was known to the persons who heard the words, and that the plaintiff was called by that term, and that they understood the defendant to mean her, for if, the meaning was not understood, the words could do her no harm. So, if the offence consist in words of themselves unmeaning, there must be an averment of some fact to support the inuendo and give them a meaning. The jury must not only be satisfied that the defendant's meaning was as charged, but that he was so understood by the persons, who heard him, which latter part can only be established by their oath. *Woolworth* v. *Meadows*, 5 East. 46. It is the same as if the charge was made in the the Chinese or any other foreign tongue (which the hearers are not presumed to understand,) and in such case there must be an averment, not only that the defendant meant to make the charge, but that he was so understood by those who heard him.

In this case, the words are, "they had better mind or I will make the *tray of biscuit roar* before Saturday night;" these words are unmeaning, and point neither to the person nor the offence. His Honor was of opinion, that it

was proper to ask the witness, what he understood the words to mean, so far as they had relation to the offence, but held that it was unnecessary so far as they had relation to the person, to whom the witness understood the defendant to attribute it. To this the plaintiff excepts. We are at a loss to perceive the ground of this distinction; the words are unmeaning, in both particulars; both equally require explanation. In fact, it is impossible to explain the one without at the same time giving an explanation of the other. The declaration contains an averment, that there had been a report, which was known to the persons, to whom the defendant spoke, that the plaintiff had stolen a tray of biscuit. The defendant and the father of the plaintiff had just quarreled, and the plaintiff was passing near to the defendant and several other persons, when he used the words—meaning to charge the plaintiff with stealing biscuit, and that he was so understood by the persons who heard him. The witness was allowed to say, that by the words "tray of biscuit roar" he understood the defendant to mean that a tray of biscuit had been stolen and to threaten a prosecution, and he understood the defendant to allude to a report, which he had heard about stealing biscuit; this was only telling half of the tale, why exclude the other? The report was, that the plaintiff had stolen biscuits. If from this and the other circumstances annexed, the witness was able to understand the defendant's meaning as to the offence, he was obliged also to understand it, as to the person: and there was the same necessity and the same reason for permitting him to give his understanding in reference to one as to the other. The rules of evidence are designed to enable plaintiffs in such actions to get at the truth, and to prevent defendants from stabbing in the dark.

Per Curiam. Judgment reversed and *venire de novo*.